TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL

NEW DELHI

Dated 10th APRIL, 2012

Petition No.75 of 2012
(M.A.No.112 of 2012)

Reliance Infratel Ltd. … Petitioner

Versus

Etisalat DB Telecom Pvt. Ltd., Mumbai … Respondent

Petition No.76 of 2012
(M.A.No. 113 of 2012)

Reliance Communications Ltd. … Petitioner

Versus

Etisalat DB Telecom Pvt. Ltd., Mumbai … Respondent

Petition No.93 of 2012
(M.A. No. 103 & 104 of 2012)

Reliance Telecom Limited … Petitioner

Versus

S. Tel Pvt. Ltd … Respondent

Petition No.94 of 2012
(M.A. No. 105 & 106 of 2012)

Reliance Communications Limited ... Petitioner

Versus

S. Tel Pvt. Ltd ... Respondent

Petition No.95 of 2012
(M.A. No. 107 & 108 of 2012)

Reliance Infratel Limited ...Petitioner

Versus

S. Tel Pvt. Ltd ... Respondent

BEFORE:

HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON
HON'BLE MR. P.K.RASTOGI,MEMBER

For Petitioner	:	Mr. Ramji Srinivasan, Sr. Advocate Mr.Thomas P. Kuruvilla, Advocate Mr. Nakul Mohta, Advocate Ms.Shally Bhasin, Advocate Ms.Shikha Sarin, Advocate
For Respondent - Etisalat	:	Mr. Maninder Singh, Sr. Advocate Mr.Ashish Prasad, Advocate Mr.Tejveer Singh Bhatia, Advocate Mr. Divyakant Lahoti, Advocate
For Respondent – S. Tel	:	Mr.Dayan Krishnan, Advocate Mr.Amit Gupta, Advocate Mr.Gautam Narayan, Advocate

O R D E R

S.B. Sinha

Introduction

`Certainty' is integral to Rule of Law, said the Supreme Court of India recently in Vodafone International Holdings B.V. vs. Union of India and Anr. reported in 2012 (1) SCALE 530.

It was also stated :-

> *"Certainty and stability form the basic foundation of any fiscal system."*

[See also Reliance Energy Ltd. and Anr vs. Maharashtra State Road Development Corp. Ltd and Ors. (2007) 8 SCC 1]

2. `Certainty in law' is highly desirable. Some academics state (with which many jurists do not agree) that one question must have one answer.

3. Adrian Vermeule in a book titled `Judging under Uncertainty' broke new grounds contending that the conceptual approach and the judge centered conclusion of older theories must give way to legal interpretation premised on institutional theories. According to the learned author, severe empirical uncertainty should give way to deference to administrative

agencies where statutes are unclear and deference to legislatures where constitutional language is unclear.

What should be done by the higher judiciary in a country like India is a different question.

4. Herring A. Willington in his book `Interpreting the Constitution' would say "if the law were clear and static a day in court would be important only in sorting out factual matters what happen, when, to whom and so on".

5. Law and life is not that easy. Law should change with the change of time but we thought that normative standards for determining the jurisdiction of a specialized Tribunal are well settled but despite the same jurisdictional issues are being raised by the litigants again and again heading to conflicting judgments creating uncertainty.

6. Construction of a Parliamentary Act constituting a new Tribunal relying on or on the basis of the decision of a High court and divesting another authority therefrom should have led to some amount of certainty.

Whether a Court or a Tribunal has jurisdiction to decide a dispute of particular nature is of vital importance to a suitor.

7. Different suitors are advised differently and approach different forums. In some of the cases ultimately they lose because of want of jurisdiction of the forum they approached. There are instances where they approach another forum only to be informed that it has also no jurisdiction.

In recent times a disturbing trend is being noticed.

8. Even a litigant like the Union of India has been taking different stands before different benches resulting in rendition of different opinions. Even the law of precedent is not certain in an era where judicial discipline is not maintained even by the co-ordinate benches of the same court.

It may be true that precedents may differ keeping in view the different interpretive processes applied by the Courts in different situations arising out of the different factual matrices, but the basic principle should not be in issue.

With this state of uncertainty, we have been called upon to determine the jurisdiction issue in these matters.

9. A jurisdictional question may be raised as a ploy. It may be raised to buy some time to avoid interim orders. But when a prima facie case in this behalf is made out, the Courts, having regard to the provisions contained in Order XIV Rule 2 of the Code of Civil Procedure or the principles analogous thereto as also a large number of decisions rendered by the Apex Court, are bound to consider the same as a preliminary issue.

10. This Tribunal, was called upon and had to deal with the issue of its jurisdiction from the time it came into being i.e. in the year 2000 at least on 50 occasions.

Law in this behalf, despite the same, does not appear to be certain even now.

With the aforementioned note, we may notice the issue on merit.

11. We would notice the fact of the matter from Petition No.75 of 2012 filed by the Reliance Infratel Ltd.

Grounds of Challenge

12. Jurisdiction of this Tribunal is in issue in these petitions which arose by reason of non-payment of a huge amount by the Respondents herein, who are licensees under Section 4 of the Indian Telegraph Act, 1885 (the 1885 Act).

Reliance Infratel Ltd. is holder of a registered certificate of ISP–1 category. Other Petitioners, however, hold licenses under the said 1885 Act.

13. It was granted a Registration Certificate to provide passive infrastructure by way of `dark fibers, right of way, duct space and tower' for the purpose of grant on lease/rent/ sale basis to the licensees of Telecom

Services licensed under Section 4 of the Act on mutually agreed terms and conditions.

14. It is contended that as a registrant, the Petitioner could not render any `telecommunication service' being not only debarred from doing so but also in view of the fact that it is not a licensee within the meaning of the provisions of Section 4 of the Act.

Registration Certificate

15. We may notice some of the clauses of the said Registration Certificate which was granted to Reliance Infratel on or about 12.1.2007 by the Union of India:-

> *"2.0 – In no case the company shall work and operate or provide telegraph service including end to end bandwidth as defined in Indian Telegraph Act, 1885 either to any service provider or any other customer.*
>
> *6.0 – The Registered Company can provide the infrastructure as stated above to any licensee of Telegraph services licensed under Section 4 of the Indian Telegraph Act 1885. The company shall, in no case, grant in any manner the infrastructure to any erstwhile Licensee whose license is either terminated or suspended or not in operation at given point of time. In the event of any infrastructure allowed before hand, then the Registered company shall be obliged to withdraw the grant of infrastructure and to disconnect or sever connectivity immediately without loss of time and further, upon receipt of any reference from the Licensor in this regard, disconnection shall be made effective within an hour of receipt of such reference. On the question of*

disconnectivity the decision of the Director General Telecom shall be final.

7.4 - The Government shall have the right to take over the equipment and networks of the Registered company or revoke/terminate/suspend the Registration of the company either in part or in whole as per directions if any, issued in the public interest by the Government in case of emergency or war or low intensity conflict or any other eventuality. Provided any specific orders or direction from the Government issued under such conditions shall be applicable to the Registered company and shall be strictly complied with. Further, the Government reserves the right to keep any area out of the operation zone of the service if implications of security so require.

7.5 – Government reserves the right to modify these conditions or incorporate new conditions considered necessary in the interest of national security and public interest.

7.6 - The Registered company will ensure that the Telecommunication installation carried out by it should not become a safety hazard and is or in contravention of any statue, rule or regulation and public policy."

16. This certificate shows that the ISP Category I Registration Certificate contains several restrictions in its operation. Such restrictions have been placed by way of terms and conditions of license as envisaged under the Proviso appended to Section 4 of the 1885 Act.

The Agreement

17. The parties hereto entered into an agreement on or about 7.7.2009.

18. Some of the relevant clauses of the said agreement read as under:-

> *"B. Service Provider is engaged in, inter alia, providing and making available the Services (as defined hereinafter) at its various Site (s) (as defined hereinafter) to cellular mobile telecom operators, pursuant to license as provided by the Department of Telecommunication (`DoT'), in India. The Service Provider is registered with DoT, Ministry of Communication, Government of India, as* ***"Infrastructure Provider Category – I";***
>
> *1.3* ***"Applicable Law"*** *means and, includes all applicable Indian statutes (both Central as well as State) including any ordinances, rules, bye laws, regulations, notifications, guidelines, policies, directions, directives and orders, of any Government Authority, statutory authority, tribunal, board, court, as may be applicable, including, without limitation any applicable rules and regulations of the DoT, the Telecom Regulatory Authority of India (TRAI) etc.;*
>
> *1.13* ***"Customer Equipment"*** *means such telecom and electronic equipment, which in conjunction with the Passive Telecom Infrastructure, is required for providing telecommunication services, maintained and operated by Customer, as more – particularly described in Annexure 1"*

19. Para 2 of the said agreement provides for the scope of services in the following terms:-

> *"2.1 The Customer hereby appoints the Service Provider to provide the Services at the Sites and the Service Provider has agreed to provide such Services at Sites to the Customer and Customer has agreed to avail Services under the terms and conditions of this Agreement. The parties acknowledge that this Agreement is on a non exclusive basis."*

20. Some of the others relevant provisions are as under:

"4.3 The Service Provider shall assist the Customer in achieving its launch by providing the Sites as mentioned in this Agreement.

7.5 Service Provider shall procure all approvals necessary for development of each of Site(S) and for the installation, commissioning, enhancements and operation of Passive Telecom Infrastructure, including without limitation the Infrastructure Provider Category- I registration. Service Provider to provide copies of such documents to the Customer and shall promptly respond to any queries raised in this regard by the Customer.

7.9 Service Provider shall submit performance and progress report with respect to uptime/ downtime, deployment SLA's detailed in Annexure 5. The periodicity of the said reports shall be in accordance and manner as mutually agreed from time to time.

10.2.4 Service Provider shall have no responsibility for the licensing, operation and/or maintenance of Customer Equipment or the services provided by the Customer in its capacity as a Unified Access Service Provider"

Clause 21.1 provides for the mechanism of settlement of disputes.

Clause 22 provides for an Arbitration Agreement.

The Present Proceedings

21. *Inter alia* on the premise that the Respondent failed and/or neglected to make payments pursuant to or in terms of the said agreement, which became due and payable as on 31.1.2012, these petitions have been filed.

The claim in the first petition is for recovery of a sum of Rs.1270.45 crores.

22. The interim prayers made by the Petitioner are as under:-

> *"i) A direction to the Respondent to secure the outstanding of over Rs. 1270.45 crore as on 31.01.2012 by way of deposit in Court and/or attachment of the equipments of the Respondent.*
>
> *ii) A direction to the Respondent, to secure the outstanding amount of Rs. 1270.45 Crore as on 31.01.2012, restraining the Respondent from in any manner dealing with/disposing off or parting with possession, alienating, transferring or selling or encumbering or creating third party rights or charge on any of the assets and movable or immovable properties, advances, loans etc. of the Respondent or on any part thereof.*
>
> *iii) Attachment of all the movable and immovable properties of the Respondent including but not limited to bank accounts/ machineries/ equipments.*
>
> *iv) Pending the hearing and final disposal of the Petition appoint a competent person as receiver in respect of all the assets both movable and immovable, and affairs of the Respondent.*
>
> *v) Restrain the Respondent from interfering with the Petitioner's possession and control of the existing sites including in respect of the equipment installed by Respondent*
>
> *vi) Petitioner shall be permitted to have lien on the Respondent's equipments*

vii) The Respondent be directed to disclose and/ or furnish information to the Petitioner of all its assets both movable and immovable as also receivables."

The Reply

23. Notices having been issued, the Respondent(s) have filed short replies wherein the question of jurisdiction of this Tribunal has been raised inter alia on the premise that the Petitioner being not a licensee within the meaning of the Proviso appended to Section 4 of `the 1885 Act' as it does not render any `Telecommunication Services' as envisaged under Section 2 (k) of the Telecom Regulatory Authority of India Act, 1997 (in short the `1997 Act'); this Tribunal has no jurisdiction to determine the disputes between the parties in terms of Section 14 thereof. Moreover, the agreements contain arbitration clauses and on that premise too, the jurisdiction of the Tribunal is ousted.

In the other cases the Petitioners contend that they hold licenses under `the 1885 Act'.

24. To the said contention, it was urged by the Respondent that the Petitioner(s) in fact also hold Certificates of Registration in ISP-1 Category and the agreement between the parties had been entered into by them in that capacity.

We, at this stage, cannot go into the said question.

25. A contention has been raised by the Respondent Etisalat D.B. that an application for winding up of the company has been filed before the Bombay High Court.

26. S. Tel. Ltd., moreover contends that in view of the judgment of the Supreme Court of India in Centre for Public Interest Litigation vs. UOI reported in (2012) 3 SCC 1, the licenses held by it having been directed to be cancelled as also having stopped rendering any service pursuant thereto, this Tribunal has no jurisdiction.

Submissions on Jurisdiction Issue

27. Mr. Maninder Singh, learned senior counsel appearing on behalf of the Respondent Etisalat D.B. would contend:

> (i) The terms of the Registration Certificate granted in favour of the Petitioner dated 12.1.2007 would clearly go to show that the Registrant having no function to perform either in terms of `the 1885 Act' or as a service provider, this petition is not maintainable.
>
> (ii) Having regard to the definition of `licensee' and `service provider' in the 1997 Act, Section 14 (1)

(a) (i) and (ii) thereof cannot be said to have any application as the certificate of registration mentions about `assets' and not `Telegraph' or `Equipment'.

(iii)In any event in terms of Clause 2 of the said Certificate of Registration/Certificate, a permission to provide Telecommunication Services having not been granted, the Petitioner is not entitled to any relief from this Tribunal.

(iv)The parties hereto having entered into an arbitration agreement, the provisions of the Arbitration and Conciliation Act, 1996 shall apply and not the provisions of the 1997 Act.

(v) The Petitioner, thus, having nothing to do with `Telegraph' and as such being not capable to provide any `Telecommunication Services' either as a licenses or otherwise, this Tribunal should hold that it cannot determine the issue between the parties on merit.

28. Mr. Dayan Krishnan, learned counsel appearing for the S.Tel Pvt. Ltd., adopted the submissions of Mr.Singh and furthermore contended that his client having ceased to be a licensee or a service provider, these petitions are not maintainable.

29. Mr.Ramji Srinivasan, learned senior counsel appearing on behalf of the Petitioners, on the other hand, submitted :-

(i) It would not be correct to contend that only because there exists an arbitration clause; this Tribunal's jurisdiction is ousted keeping in view the object and purpose for which the 1997 Act had been enacted.

(ii) A distinction must be made between a dispute between the licensor and licensee and one between a service provider and a service provider.

(iii) A holder of ISP Registration Certificate is also a service provider and, thus, the Respondent being admittedly a licensee and, thus, a service provider, a dispute inter se between two service providers can be determined only by this Tribunal and not any other Court/Forum.

(iv) The terms `any dispute' occurring in Section 14 of the 1997 Act must be held to be of wide amplitude and this Tribunal having the requisite jurisdiction to determine the same, the term `service provider' should also be construed in the widest possible term.

(v) From a perusal of the Preamble to the Act, it would be evident that this Tribunal has not only jurisdiction to adjudicate `any dispute', but also to protect the interest of the service providers in the Telecom Sector; proper meaning thereto must be given.

(vi) The provisions of Sections 11, 12 and 13 of the 1997 Act providing for functions of the TRAI, are not limited to the licenses granted under the 1885 Act and the Regulator having the jurisdiction to make regulations with regard to Passive Infrastructure also, there cannot be any doubt or dispute that this Tribunal would have jurisdiction to adjudicate the dispute between the parties hereto.

(vii) The word `Telegraph' would include both `Passive Infrastructure' and `Active Infrastructure' and

keeping in view the fact that the Respondent itself could carry out those activities and it having outsourced the same, the Petitioner must also be held to have been functioning as a service provider.

(viii) The word `and' contained in Section 4 of the 1885 Act should be read as `or' and so read, an appropriate meaning can be assigned to the UOI's power sofar as its right to part with exclusive privilege is concerned.

(ix) There are various decisions of this Tribunal wherein inter alia it has been held that interconnectivity between the service providers need not be established for the purpose of maintainability of the petition and, thus, it must be held that these petitions are maintainable.

(x) The Respondent before the Delhi High Court in another matter having categorically stated that this Tribunal only has jurisdiction, it is estopped and precluded from questioning the jurisdiction of this Tribunal.

The 1885 Act

30. The Act was enacted to amend the law relating to `Telegraphs' in India.

Section 4 of the Act and the Proviso appended thereto, which is relevant for our purpose, read thus :-

> ***"4. Exclusive privilege in respect of telegraphs, and power to grant licenses.***
>
> *(1) Within [India], the Central Government shall have exclusive privilege of establishing, maintaining and working telegraphs:*
>
> *Provided that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of [India]"*

31. Section 20 provides for penalty, sub-section 1 whereof reads thus :-

> ***"20. Establishing, maintaining or working unauthorized telegraph –***
>
> *(1) if any person establishes, maintains or works a telegraph within (India) in contravention of the provisions of Section 4 or otherwise than as permitted by rules made under that section, he shall be punished, if the telegraph is a wireless telegraph, with imprisonment which may extend to three years, or with fine, or with both, and, in any other case, with a fine which may extend to one thousand rupees."*

The 1933 Act

32. In the year 1933 the Indian Wireless Telegraphy Act (hereinafter called and referred to for the sake of brevity as 'The 1933 Act') was enacted for the purpose of regulating the possession of the Wireless Telegraphy Apparatus, Section 5 whereof reads thus :-

> *"5. Licenses – The telegraph authority constituted under the Indian Telegraph Act, 1885 (13 of 1885), shall be the authority competent to issue licenses to possess wireless telegraphy apparatus under this Act, and may issue licenses in such manner, on such conditions and subject to such payments as may be prescribed."*

Section 3 prohibits possession of 'wireless telegraphy apparatus' without a license.

Section 6 provides for a penal provision.

The 1997 Act

33. The Parliament enacted the 1997 Act constituting Telecom Regulatory Authority of India (TRAI).

The TRAI has not only the power to frame Regulations, it may execute and monitor the provisions thereof as well as adjudicate on any dispute between the parties.

34. By reason of Act 2 of 2000, however, this Tribunal was constituted as a result whereof the TRAI was divested of its adjudicatory functions.

35. We may notice at the outset the Preamble of the 1997 Act.

> *"An Act to provide for the establishment of the [Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interest of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector] and for matters connected therewith or incidental thereto."*

36. Section 2 (e) defines a `licensee' to mean any person licensed under sub-section 1 of Section 4 of the Act for providing specified public telecommunication services.

The word `licensor' has been defined to mean the Central Government or the Telegraph Authority who grants a license thereunder.

37. Section 2 (j) defines `service provider' in the following terms:-

> ***"service provider"*** *means the Government as a service provider and includes a licensee"*

38. `Telecommunication Services' has been defined in Section 2 (k) thereof. It reads as under:-

"2(k) - 'telecommunication service' means service of any description (including electronic mail, voice mail, data services, audio tax service, video tax services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic means but shall not include broadcasting services.

[Provided that the Central Government may notify other service to be telecommunication service including broadcasting services.]

39.Subsection 2 of Section 2 reads as under:

"(2) Words and expressions used and not defined in this Act but defined in the Indian Telegraph Act, 1885 or the Indian Wireless Telegraphy Act, 1933 (17 of 1933) shall have the meanings respectively assigned to them in those Acts."

40. Sections 11, 12 and 13 of the Act provide for the regulatory powers of the TRAI.

Clause (a) of sub-Section 1 of Section 11 empowers it to make recommendations either *suo motu* or on a request of the licensor; whereas Clause (b) thereof enumerates its functions.

Section 12 empowers the TRAI to call for information, conduct investigations etc.

41. Section 14 of the 1997 Act reads as under :-

"<u>Section 14</u>

*"**Establishment of Appellate Tribunal** - The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to-*

(a) adjudicate any dispute-

(i) between a licensor and a licensee;
(ii) between two or more service providers;

(iii) between a service provider and a group of consumers;

Provided that nothing in this clause shall apply in respect of matters relating to-

(A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under Sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);

(B) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under Section 9 of the Consumer Protection Act, 1986 (68 of 1986);

(C) disputes between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian Telegraph Act, 1885 (13 of 1885);

(b) hear and dispose of appeal against any direction, decision or order of the Authority under this Act."

Section 14 (A) of the 1997 Act lays down the procedures for filing a petition before this Tribunal.

42. Section 15 bars the jurisdiction of the Civil Courts.

Interpretation Clause

43. The interpretation of the words `means' and `includes' is well-settled by now.

44. The word `means' will show that it will have no other meaning; whereas the words `includes' will show that the definition is expansive.

[See DDA vs. Bhola Nath Sharma (2011) 2 SCC 54 and UOI and Anr. vs. Association of Unified Telecom Service Providers of India & Ors. (2011) 10 SCC 543]

45. In Bharat Coop. Bank (Mumbai) Ltd. vs. Coop. Bank Employees Union reported in (2007) 4 SCC 685 wherein its earlier decision in P. Kesilngam and Ors. vs. P.S.G. College of Technology and Ors. reported in 1995 Supp (2) SCC 348 has been referred to the law has been laid down by the Apex Court in the following terms:-

> *"23. Section 2(bb) of the ID Act as initially introduced by Act 54 of 1949 used the word "means... and includes" and was confined to a "Banking Company" as defined in Section 5 of*

the Banking Companies Act, 1949, having branches or other establishments in more than one province and includes Imperial Bank of India. Similarly, Section 2(kk), which was also introduced by Act 54 of 1949, defines Insurance Company as "an Insurance Company defined in Section 2 of the Insurance Act, 1938 (IV of 1938), having branches or other establishments in more than one province". It is trite to say that when in the definition clause given in any statute the word "means" is used, what follows is intended to speak exhaustively. When the phrase "means" is used in the definition, to borrow the words of Lord Esher M.R. in Gough vs. Gough , it is a "hard and fast" definition and no meaning other than that which is put in the definition can be assigned to the same. (Also see: P. Kasilingam and Ors. vs. P.S.G. College of Technology and others). On the other hand, when the word "includes" is used in the definition, the legislature does not intend to restrict the definition; makes the definition enumerative but not exhaustive. That is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise. Therefore, the use of the word "means" followed by the word "includes" in Section 2(bb) of the ID Act is clearly indicative of the legislative intent to make the definition exhaustive and would cover only those banking companies which fall within the purview of the definition and no other."

46. The difficulty arises in the instant case having regard to the uncertainty attached to the interpretation of the word `service provider'. The said word has not been defined. It has to be assigned a meaning. What constitutes 'service' and who provides service to whom would be the question.

Ordinarily service need not be provided to the customers only. It may be provided to other service providers as well.

47. The Government may or may not provide service in its capacity as a `licensor' or `owner of exclusive privilege', but if that be so it was expected that the Parliament would clearly state as to in what capacity it would render service and to whom. Both the Government and the licensee in terms of the definition are service providers.

48. Similarly `Telecommunication Services' as defined in Section 2 (k) employs the words `service of any description'.

Both the aforementioned words are very wide in nature and therefore, in our opinion, deserve a purposive interpretation.

Interpretation Issue

49. Interpretation of any statute is required to be taken recourse to when the general meaning of the relevant provision is not clear.

50. Subsidiary rules of interpretation is necessary to be resorted to for the purpose of considering the words 'and' and 'or' used in a statute to be `conjunctive' or `disjunctive'.

51. Whereas Mr.Ramji Srinivasan would contend that the word `and' should be read as `or' in Section 4 of the Act; Mr.Maninder Singh would

contend that the word `or' should be read as `and' in the proviso appended thereto.

There cannot be any doubt or dispute that `and' can be read as `or' and the vice versa.

52. The statutory scheme has to be considered upon reading the statute as a whole. It is well settled that a statute must be read in its entirety and then Chapter by Chapter, Section by Section and thereafter Word by Word.

Interpretation of Section 4 of the Act so far as the submissions raised by the learned counsel for the parties is concerned i.e. or may be read as 'and' and 'or' may be read as 'and', must also be considered having regard to the provisions of Sections 7 and 20 of the Act. The said provision also uses the word `or'.

53. The circumstances in which the expression `and' can be read as `or' and vice versa has been examined by the Supreme Court in Union of India v. Ind-Swift Laboratories Limited, (2011) 4 SCC 635 at page 641 in the following words:

> *"17. A statutory provision is generally read down in order to save the said provision from being declared unconstitutional or illegal. Rule 14 specifically provides that where CENVAT credit has been taken or utilised wrongly or has been erroneously refunded, the same along with interest would be recovered from the manufacturer or the provider of the output service. The issue is as to whether the aforesaid word "or" appearing in Rule 14, twice, could*

be read as "and" by way of reading it down as has been done by the High Court. If the aforesaid provision is read as a whole we find no reason to read the word "or" in between the expressions "taken" or "utilised wrongly" or "has been erroneously refunded" as the word "and". On the happening of any of the three aforesaid circumstances such credit becomes recoverable along with interest."

54. It was further held that:

> ***"21.*** *Therefore, the attempt of the High Court to read down the provision by way of substituting the word "or" by an "and" so as to give relief to the assessee is found to be erroneous. In that regard the submission of the counsel for the appellant is well founded that once the said credit is taken the beneficiary is at liberty to utilize the same, immediately thereafter, subject to the Credit Rules."*

The said decision was rendered in the context of a `Taxing Statute'. It was held having regard to an order passed by an appropriate authority while exercising a power of judicial review; the same should not be read down.

55. The provisions of Section 4 and the proviso appended thereto have been used for different purposes.

Section 4 stipulates that the Central Government shall be the holder of `exclusive privilege' in respect of Establishment, Maintenance and Working of a Telegraph. The exclusive privilege, therefore, was in respect of all three components of `telegraph activities'.

The proviso, however, uses the word `or' in the context of parting with the said privilege.

In the opinion of this Tribunal, the Union of India being statutorily entitled to part with its privilege in its entirety is also entitled to part therewith in bits and pieces.

56. Section 7 of the Act provides for a rule making power; sub-sections 1 and 3 whereof reads as under :-

> ***"7. Power to make rules for the conduct of telegraphs***
>
> *(1) The Central Government may, from time to time, by notification in the Official Gazette, make rules consistent with this Act for the conduct of all or any telegraphs established, maintained or worked by the Government or by persons licensed under this Act.*
>
> *(3) When making rules for the conduct of any telegraph established, maintained or worked by any person licensed under this Act, the Central Government may by the rules prescribe fines for any breach of the same:*
>
> *Provided that the fines so prescribed shall not exceed the following limits, namely:-*
>
> *i. When the person licensed under this Act is punishable for the breach, one thousand rupees, and in the case of a continuing breach a further fine of two hundred rupees for every day after the first during the whole or any part of which the breach continues.*
>
> *ii. When a servant of the person so licensed, or any other person, is punishable for the breach, one-fourth of the amounts specified in clause (i)."*
> *(Emphasis supplied)*

57. The 1885 Act, therefore, itself contemplated that rules could be framed in respect of all or any of the components of a `Telegraph'.

How the Central Government itself understood the same would also be relevant.

58. Recently, in Krishi Utpadan Mandi Samiti, Allahabad vs. Baidyanath Ayurved Bhawan Pvt. Ltd. (2011) 12 SCC 277, circular letter issued under the Rules had also been taken into consideration in construing the exemption provision contained in the Act.

We have noticed heretobefore that the word `service provider' having not been defined, the ordinary popular or commonsense meaning may be attributed to it to. (See Commissioner of Customs, Calcutta vs. G.C. Jain and Anr. (2011) 12 SCC 713).

We may furthermore note that after two public sector undertakings had come into being; namely MTNL and BSNL, the Government does not act as a `service provider'. It may, however, do so.

59. The definition of `service provider' was amended in January, 2000. At that point of time the Government used to provide services, BSNL having been constituted in the later part of the same year.

60. There is no prohibition on the part of the Government to provide services even now, and for any reason whatsoever, it may reserve unto itself the right to provide service.

61. Rendition of 'telecommunication services' may take place at several stages. For the purpose of interpretation of the dispute resolution clause contained in the 1997 Act, the Apex Court in Tata Teleservices (supra) held that even a letter of intent holder would be a licensee.

Service has to be rendered to the ultimate consumer effectively and efficiently. How and in what manner the same would be done maybe a subject matter of Regulation. Guidelines therefor can also be provided.

62. Jurisdiction of this Tribunal does not end with the transmission of signals to the customer but also the activities of the licensee even thereafter. The consumer may have a grievance against the licensee, which has to be redressed. The standard of the equipments may have to be laid down.

63. We need not elaborate on this issue as from the discussions made hereinafter it would be evident that rendition of service can be effected at different stages. It is only in that view of the matter, in our opinion, the term 'telecommunication service' cannot be ascribed a narrow meaning.

This would lead to a further question as to what the word `service provider' ordinarily means. It's meaning is simple, i.e, who provides

service. It does not say service must be provided to the ultimate consumer. May be that is the ultimate goal but in a given case the licensee may outsource its activities. What, however, is essential is that the last leg of services must be rendered to the customer.

64. In Union of India vs. Martin Lottery Agencies Ltd. (2009) 12 SCC 209, in the context of Service Tax Act, it was noticed:

> *"20. The word `service' has not been defined in the Act. Its dictionary or etymological meaning may or may not be appropriate. We would, however, notice its dictionary meaning :*
>
> > *"Work done or duty performed for another or others; a serving; as, professional services, repair service, a life devoted to public service.*
> >
> > *An activity carried on to provide people with the use of something, as electric power, water, transportation, mail delivery, telephones, etc.*
> >
> > *Anything useful, as maintenance, supplies, installation, repairs, etc., provided by a dealer or manufacturer for people who have bought things from him."*
>
> ....
>
> *22. Service tax purports to impose tax on services on two grounds (1) service provided to a consumer and (2) service provided to a service provider. Service provided in respect of the matters envisaged under clause (19) of Section 65 of the Act must be construed strictly. Before a tax is found to be leviable, it must come within the domain of legitimate business and/or trade."*

65. In IndusInd Communication Ltd. Vs. City Cable and others, Petition No. 67 (C) of 2008 disposed of on 27.7.2011, it was held:-

> *"89. Yet again the definition of the word `service provider' contained in Regulation 2(n) of the Regulations is not an exhaustive one. It must be given a meaning which fits in the changing scenario on the nature of the business."*

It is thus, not uncommon that a service provider would render service to another service provider.

66. In certain cases, thus, even the dictionary meaning can be relied upon for construction of the interpretation clause. [See GVK Industries Ltd and Anr vs. Income Tax Officer and Anr. (2011) 4 SCC 36].

67. If the word `service provider' is vague, it is possible to take recourse to different rules of interpretation including the rule of purposive construction.

The object of the statute being clear, the jurisdiction of this Tribunal must be held to be of wide amplitude.

The term `service provider' includes `licensee'.

If we are right in our conclusion that a registrant under ISP Category I Registration Certificate is also a licensee, the logical corollary thereof would be that it would come within the purview of the term `Service Provider'.

If that be so, both the parties hereto being licensees would come within the purview of the term `Service Provider' and thus, a dispute

between them as regards supply of `telegraph' would be amenable to the jurisdiction of this Tribunal as envisaged under Section 14 of the 1997 Act.

68. IndusIndus Media (Supra) this Tribunal negatived the contention of the Respondent therein that they were not service providers holding that they having been in possession of the headends of the Petitioners and being in control and management thereof, they were distributors of TV Channels, although they were not the owners thereof. A dispute between the owner of the equipments and an agent in management and control thereof was, thus, held to be amenable to the jurisdiction of the Tribunal.

The history of the legislation can also be taken into consideration for the purpose of construction of statute [See Fuerst Day Lawson Ltd vs Jindal Exports Ltd. (2011) 8 SCC 333].

69. The 1885 Act, therefore, provides for a regulatory regime. The jurisdiction of this Tribunal so far as it's jurisdiction with regard to adjudication of dispute is concerned would remain the same as was vested in TRAI, say much more. In other words, a dispute between two licensees or service providers would be amenable to the jurisdiction of this Tribunal, if they render services in relation to or in connection with 'telecommunication services'.

70. In this case ISP Category I license is also granted by the DoT under the 1885 Act. It's activities also pertain to 'telecommunication services'.

The Act permits the TRAI to make Regulations and to exercise its functions over the entire regulatory field, including `Passive Infrastructure'.

71. Recently the TRAI has issued a consultation paper involving `Passive Infrastructure' (See Consultation Paper on Issues related to Telecommunications Infrastructure Policy dated 14.1.2011).

It, therefore, comes within the purview of the regulatory regime.

Purposive Construction – Rules of

72. Keeping in view the recent decision of the Supreme Court of India in the case of Centre for Public Interest Litigation (supra), it may not be necessary for us to notice the history as also the developments in the field.

The Doctrine of Purposive Interpretation may be resorted to for the purpose of ascertaining the purpose and object for which said acts were enacted.

73. Francis Bennion in his book on Statutory Interpretation 5th Edition at page 945, states the law thus:-

"….Legislation is still about remedying what is thought to be a defect in the law. Even the most 'progressive' legislator, concerned to implement some wholly novel concept of social justice, would be constrained to admit that if the existing law accommodated the notion there be no need to change it. No legal need that is. Legislation possesses a propaganda value also.

Contrast with literal construction - Although the term `purposive construction' is not new, its entry into fashion betokens a swing by the appellate courts away from literal construction. Lord Diplock said in 1975 :

> *`If one looks back to the actual decisions of [the House of Lords] on questions of statutory construction over the last 30 years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purpose construction of statutory provisions.'*

The matter was summed up by Lord Diplock in this way:

> *"…I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language use would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction, even where this involves reading into the Act words which are not expressly included in it. Kammins Ballrooms Co Ltd V Zenith Investments (Torquay) Ltd [1971] AC 850 provides an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the*

purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by parliament had their attention been drawn to the omission before the Bill passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which parliament has passed.'

"Lord Diplock's third point is, with respect, erroneous. In an earlier case the House of Lords had adopted a purposive-and-strained construction while expressly ruling out any need to formulate the missing words. The truth is that it is almost invariably possible to formulate the same legislative proposition in numerous different ways. All drafters know that no two of them, given a set of instructions will produce a Bill in identical wording, or anything like it."

74. In Grid Corporation of Orissa Limited v. Eastern Metals and Ferro Alloys, (2011) 11 SCC 334 at page 342 it is stated as under:

"25. This takes us to the correct interpretation of Clause 9.1. The golden rule of interpretation is that the words of a statute have to be read and understood in their natural, ordinary and popular sense. Where however the words used are capable of bearing two or more constructions, it is necessary to adopt purposive construction, to identify the construction to be preferred, by posing the following questions: (i) What is the purpose for which the provision is made? (ii) What was the position before making the provision? (iii) Whether any of the constructions proposed would lead to an absurd result or would render any part of the provision redundant? (iv) Which of the interpretations will advance the object of the provision? The answers to these questions will enable the court to identify the purposive interpretation to be preferred while excluding others. Such an exercise involving ascertainment of the

object of the provision and choosing the interpretation that will advance the object of the provision can be undertaken, only where the language of the provision is capable of more than one construction. (See Bengal Immunity Co. Ltd. v. State of Bihar [AIR 1955 SC 661 : (1995) 2 SCR 603] and Kanai Lal Sur v. Paramnidhi Sadhukhan [AIR 1957 SC 907 : 1958 SCR 360] and generally Justice G.P. Singh's Principles of Statutory Interpretation, 12th Edn., published by Lexis Nexis, pp. 124 to 131, dealing with the rule in Heydon case [(1584) 3 Co Rep 7a : 76 ER 637] .)"

75. In DLF Universal Limited v. Director, Town and Country Planning Department, Haryana, (2010) 14 SCC 1 it was stated:

"13. It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualise. It comprises the joint intent of the parties. Every such contract expresses the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both the parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation."

{See Regional Provident Fund Commissioner Vs The Hooghly Mills Co. Ltd. [(2012) 2 SCC 489]}.

It is on the said premise only the purpose and object for which the Act has been enacted has to be considered.

What was the underlying object of the 1997 Act?

76. As we see it, the Parliament intended to create a forum where disputes relating to or leading to `Telecommunication Services' would be adjudicated.

In the matter of rendition of telecommunication services or Broadcasting Services, there are many stakeholders.

The dispute between two stakeholders; in some cases both the disputants may be belonging to the same category e.g. a Broadcaster and a Content Aggregator, and thus a 'Broadcaster' are required to be adjudicated.

77. An old Act would have gaps. Even otherwise with the passage of time, a new meaning may have to be assigned. The Parliament might not have the occasion to consider many aspect of the matter. Many new scientific discoveries might have been made. New technologies might have come into being. Creative interpretation must take into consideration the march in technology.

With the passage of time the business model may change. New stakeholders would join the business. New type of agreements and commercial arrangements may be entered into.

78. Creative interpretation by a court of law upon taking into consideration a large number of factors, thus, becomes necessary when a gap is found in the statute.

79. In IndusInd Media & Communications Ltd. (supra) such a gap was found.

In that judgment it was stated:

> *"Not only the MoU but also the conduct of the parties goes to show that the responsibilities and functions of respondent No.1 was not that of a mere money collecting agent. Had that been so, it could not have rendered any other services to the petitioner or the subscribers. It could not have telecast its own films. It would not have any occasion to take over the network of the petitioner.*
>
> *A contention has also been noticed in the accompanying judgement that most of the cable operators have rejoined the network of the petitioner which clearly implies that before rejoining the networks of petitioner, may be for a limited period, the local cable operators were having supply of signals of the channels of different broadcasters from a head end which was under the complete control of the respondent No.1.*
>
> *Hijacking of the network of the petitioner was the cause of action for the first set of petitions. If the first set of petitions were maintainable against the respondent, there is absolutely no reason as to why the second set of petitions*

would not be maintainable. The function of respondent No.1 in each of these matters as service providers will have to be determined having regard to the factual matrixes involved, the contentions raised and the findings of facts arrived thereupon. Once the respondents are found to be in control and management of the networks in question, apart from other findings, by itself would lead to a conclusion that they were service providers for the purpose of determining the issues involved herein."

80. Keeping in view the fact that broadcasting services were notified to be 'telecommunication services', this Tribunal in the case of Total Telefilms Vs. Prasar Bharati (Petition No. 183 (c) of 2008 decided on 15.12.2008) categorically held that a literal meaning to the said term cannot be given in the context of broadcasting services.

It was also so opined in the case of Star India Vs. BSNL which dealt with a case of convergence.

81. It is therefore, evident that keeping in view the creation of march in the technology as also the fact that the regulator although in some cases made attempts but could not fill the gaps the purpose and object for which the 1997 Act was enacted must be given to by 'judge made law'. The judiciary will have to step in by giving proper and meaning to the relevant words employed in a statute. A statute must be construed so that it remains workable.

82. A purposive interpretation in the context of the Regulatory regime the Parliament intended to bring about, in our opinion, may be given effect to by assigning expansive meaning to the words in question. Services to the customers, therefore, in our opinion would mean the service ultimately reaching the customer and all the intermediate processes involved therein.

Application of the 1997 Act

83. If any dispute between the licensor and the service provider is a dispute within the meaning of the provisions of Section 14 of the Act, there is absolutely no reason as to why the dispute between a licensee and a licensee (in this case, the Respondent) being a person who has been granted a license (ISP-I Registrant) and who provides services to a licensee, which is to the ultimate benefit of the customer, would not come within the purview thereof.

84. Submission of Mr. Maninder Singh that in the registration certificate the word `assets' has been used, and not the 'apparatus', in our considered view, is of not much significance. The said words would include apparatus and telegraph which would otherwise come within the purview thereof.

A stakeholder may outsource its activities of telecommunication services.

85. Jurisdiction of the Civil Courts are barred. A litigant may approach the Civil Court to be ultimately informed that it had no jurisdiction.

The purpose of creating a specialized tribunal to deal with all kinds of disputes between two providers of service should not be allowed to be defeated by creating uncertain situations.

86. Such uncertainty will, in our opinion, hamper the growth of the industry. It may adversely affect the national economy.

Service providers and the consumers whose interests are to be protected in terms of the `Preamble' to the 1997 Act would be the worst sufferers.

Object of creating specialized forums shall also be defeated, it being part of 'Structural Judicial Reform'.

With this preface, the jurisdictional question raised by the Respondent will have to be determined.

Creation of an Expert Tribunal - The Purpose of

87. A specialized `expert Tribunal' is created for certain purposes Whereas Tribunalization of the judiciary is looked down upon, the Supreme Court of

India recently in R. Gandhi vs. President, Madras Bar Association, reported in (2010) 11 SCC 1, with regard to the constitution of the National Taxation Tribunal, held as under:

> *"…While one can understand the presence of the members of the civil services being technical members in Administrative Tribunals, or Military Officers being members of the Armed Forces Tribunals, or electrical engineers being members of the Electricity Appellate Tribunal, or telecom engineers being members of TDSAT, we find no logic in members of the general civil services being members of the Company Law Tribunals."*

The Constitution Bench of the Supreme Court made a distinction between the `company law' matters and other matters, stating:-

> *"The practice of having experts as technical members is suited to areas which required the assistance of professional experts, qualified in medicine, engineering and architecture etc."*

It was stated :-

> *"(iii) A "technical member" presupposes an experience in the field to which the Tribunal relates. A member of the Indian Company Law Service who has worked with Accounts Branch or officers in other departments who might have incidentally dealt with some aspect of company law cannot be considered as "experts" qualified to be appointed as technical members. Therefore clauses (a) and (b) of sub-section (3) are not valid.*
>
> *(iv) The first part of clause (f) of sub-section (3) providing that any person having special knowledge or professional experience of 20 years in science, technology, economics, banking, industry could be considered to be persons with*

expertise in company law, for being appointed as technical members in the Company Law Tribunal, is invalid.

(v) Persons having ability, integrity, standing and special knowledge and professional experience of not less than fifteen years in industrial finance, industrial management, industrial reconstruction, investment and accountancy, may however be considered as persons having expertise in rehabilitation/revival of companies and therefore, eligible for being considered for appointment as technical members."

88. TDSAT, in several decisions of the Supreme Court of India has been referred to as an `Expert Tribunal'. If that be so, any question which requires not only determination of any dispute but also interpretation of contracts involving technical questions and the matters coming within the preview of the regulatory regime will attract the jurisdiction of this Tribunal. (See Clear Media vs. Prasar Bharti Petition No.174 (C)/2010 disposed of on 21.4.2011).

It is in the aforementioned context, we may also notice that in the Leggatt report and a White paper, which preceded the 2007 Judicial Reforms in the United Kingdom, noticed that there are, of course, advantages and disadvantages of the Tribunal, but it is beyond any doubt or dispute that expertise of a Tribunal is an accompanied advantage.

89. Tribunals in the changed context become essential part of justice delivery system between a citizen and another as also a citizen and State in a wide variety of context. They are necessary for upholding the Rule of Law.

90. It was so held in Gillies vs. Secretary of State for Work and Pension reported in (2006) 1 WLR 781 :

> *"36. Tribunals were once regarded with the deepest of suspicion but they are now an essential part of our justice system. They are mostly here to secure justice between citizen and state in a wide variety of contexts, the most numerically important of which is entitlement to the financial benefits provided by the welfare state. Since the Report of the Donoughmore Committee on Ministers' Powers (Cmd 4060, 1932), it has been recognised that tribunals can have important advantages over courts of law. These are 'cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject': see the Report of the Franks Committee on Administrative Tribunals and Enquiries (Cmnd 218, 1957, para 38). The Report of Sir Andrew Leggatt's Review of Tribunals, Tribunals for Users, One System, One Service (2001, paras 1.11 to 1.13) suggests three tests of whether tribunals rather than courts should decide cases. The first is participation: that users should be able to prepare and present their own cases effectively. The third is the need for expertise in the area of law involved: users should not have to explain to the tribunal what the law is. The second is the need for special expertise in the subject matter of the dispute:*
>
> *Where the civil courts require expert opinion on the facts of the case, they generally rely on the evidence produced by the parties – increasingly jointly – or on a court appointed assessor. Tribunals offer a different opportunity, by permitting decisions to be reached by a panel of people with a range of qualifications and expertise. … users clearly feel that the greater expertise makes for better decisions.*
>
> *Expertise on the tribunal not only improves decision-making and reduces the need for outside expertise; it also thereby increases the accessibility and user-friendliness of the proceedings"*

91. It was also observed:

"40. The relevant facts of tribunal life include the great advantage, both to its users and to its decision-making, of being able to call upon the people with the greatest expertise in the subject matter of the claim. Given the wide variety of disabilities which come before the Disability Appeal Tribunals, it would not be practicable to have a specialist in the particular disability involved in the particular case. The greatest expertise in assessing the claimant's condition and applying the statutory criteria to it is likely to be held by those doctors who are experienced in making these assessments at the point of claim. To have such expertise available on the tribunal can only be an advantage to it."

H.W.R. Wade & C.F. Forsyth also refer to the advantages of tribunals in their *Administrative Law*, (10th Edn., at pp. 773-74).

92. It was stated:

"The social legislation of the twentieth century demanded tribunals for purely administrative reasons: they could offer speedier, cheaper and more accessible justice, essential for the administration of welfare schemes involving large numbers of small claims. The process of the courts of law is elaborate, slow and costly. Its defects are those of its merits, for the object is to provide the highest standard of justice; generally speaking, the public wants the best possible article, and is prepared to pay for it. But in administering social services the aim is different. The object is not the best article at any price but the best article that is consistent with efficient administration. Disputes must be disposed of quickly and cheaply, for the benefit of the public purse as well as for that of the claimant. Thus when in 1946 workmen's compensation claims were removed from the courts and brought within the tribunal system much unproductive and expensive litigation, particularly on whether an accident occurred in the course of employment, came to an end. The whole system is based on compromise, and it is from the dilemma of weighing quality against convenience that many of its problems arise.

An accompanying advantage is that of expertise. Qualified surveyors sit on the Lands Tribunal and experts

in tax law sit as Special Commissioners of Income Tax. Specialised tribunals can deal both more expertly and more rapidly with special classes of cases, whereas in the High Court counsel may take a day or more to explain to the Judge how some statutory scheme is designed to operate. Even without technical expertise, a specialised tribunal quickly builds up expertise in its own field. Where there is a continuous flow of claims of a particular class, there is every advantage in a specialised jurisdiction."

(Emphasis Added)

In this Tribunal apart from the party in person, several professional can represent the litigant. Lawyers alone do not have the monopoly to represent the litigants.

93. S.A De'Smith in his celebrated book of Judicial Review of Administrative Action 6th Ed. At page 50, stated:

"In the design of an administrative justice system, a tribunal may be preferred to an ordinary court because its members have specialized knowledge of the subject matter, because it will be more formal in its trapping and procedure because it may be better at finding facts, applying flexible standards and exercising discretionary powers, and because it may be cheaper, more accessible and more expeditious than the High Court."

Early resolution of disputes is also one of the advantages which can be attributed to an Expert Tribunal.

The 1997 Act provides that all such disputes should be disposed of within a period of three months.

94. When a dispute is raised before the Courts of 'Judicial Review', its jurisdiction would be limited unlike that of the Tribunal, which exercises original and appellate jurisdiction.

Even in UK, as alternative to judicial review, specialized Tribunals have been constituted.

Competition Appellate Tribunal has been hearing appeals from the decision of the Telecom Regulator (OFCOM).

95. In some case, the Tribunal has been held to be competent to act as a primary decision maker.

Nigel Pleming QC in an article of Judicial Review of Regulators published in Effective Judicial Review – A Cornerstone of Good Governance, has stated that as an alternative to judicial review, a number of specialized tribunals have been created.

96. There is another aspect of the matter which may also not be lost sight of. Access to justice is not only a human right but also a fundamental right. With a view to perform its constitutional obligation the States are obligated to create forums which would be capable of rendering justice to the disputants vis-a -vis their grievances.

Failure to provide such forums would be violative of the constitutional scheme of separation of power as also the constitutional policy.

97. We may notice that the European Court of Human Rights in Hatton vs. United Kingdom 15 BHRC 259 held that failure on the part of the State to provide a forum of judicial review which did not interfere with a policy decision infringing the right of privacy of a citizen is violative of the Human Rights Act, 1998 and thus, the State must pay damages to the disputants.

98. The jurisdiction of an original court vis-à-vis the court exercising the power of judicial review is also required to be taken into consideration. The jurisdiction of a court exercising original or appellate power indisputably would be wider than judicial review, which ordinarily is confined to the decision making process and not the merit of the decision.

A person who has a grievance is entitled to approach a forum.

A forum providing for an appellate power would undoubtedly be preferable to the one providing for judicial review only.

99. A distinction must also be borne in mind between any Tribunals which do not have the adjudicatory power and those who have. This Tribunal is a 'Court' being entitled to execute its decree. It

has a limited power of contempt. The jurisdiction of the ordinary civil court is barred. Independence and impartiality of this Tribunal even having regard to the mode of appointments of its Members is beyond any doubt or dispute.

Section 14 of the Act uses the expression 'any dispute'. The word 'any' and 'dispute' are of great significance.

100. In IndusInd Media & Communications Ltd. (Supra), it has been held:-

> *"103. We may also notice that the Supreme Court of India, in Shri Balaganesan Metals v. M.N. Shanmugham Chetty, reported in 1987 : (1987) 2 SCC 707 opined that a statute should not be so construed to render any provision otiose.*
>
> *104. It was further held that:*
>
> *The word "any" has the following meaning:*
>
> *some; one of many; an indefinite number. One indiscriminately or whatever kind or quantity.*
>
> *Word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject matter of the statute.*
>
> *It is often synonymous with 'either', 'every' or 'all'. Its generality may be restricted by the context;" (Black's Law Dictionary, 5th Edn.)*
>
> *105. The word "Any" and "Dispute" are defined in Stroud's Judicial Dictionary of Words and Phrases, 16th Ed., at pages 135 and 707 as follows:*

ANY. "Any" is not confined to a plural sense (Eaton v. Lyon, 3 Ves.694).

"Any" is a word which excludes limitation or qualification (per Fry, L.J., Duck v. Bates, 12 Q.B.D. 79); "As wide as possible" (per Chitty, J., Beckett v. Sutton, 51 L.J. Ch. 433)

DISPUTE. A Clause providing for an arbitration "should any dispute arise", includes disputes of law as well as of fact (Forwood v. Watney, 49 L.J.Q.B. 447); and also a nonfeasance, e.g. the withholding a certificate (Re Hohenzollern Co., 54 L.T. 596)

106. Another aspect of the matter must also be considered, namely when a question arises on true interpretation or construction of Regulations, this Tribunal would have jurisdiction.

107. It was so held recently in Clear Media India Pvt Ltd v. PrasarBharti, being Petition No 174(C) of 2010 disposed of on 21st April, 2011."

101. Recently in Vodafone Mobile Services Ltd. & Ors. vs. Union of India (DoT) this Tribunal wherein again the jurisdiction of this Tribunal was in question by an order dated 20.1.2012, held:

"26. Interpretation of a condition of license as also the grievance of a licensee that a demand has wrongly been raised having regard to the definition of `adjusted gross revenue' if found to be maintainable, we do not see any reason why interpretation of conditions of licence, so far as the same relates to the activities of the licensor are concerned, shall be outside the jurisdiction of this Tribunal.

27. Mr. Chandhiok, learned Additional Solicitor General has also relied upon an unreported order of the Supreme Court of India in M/s Tata Tele Services Ltd vs UOI, Civil Appeal No.4878/2011 disposed of on 19.8.2011 which is in the following terms :-

"Having heard learned senior advocates on both sides, we are of the view that, in substance, the matter concerns impugned allocation of spectrum. This matter, in our view, can only be challenged by way of judicial review, as held in our earlier judgment in PTC India Limited Vs Central Electricity Regulatory Commission , reported in 2010 (4) SCC 603. In the circumstances, we dismiss this civil appeal with a rider, namely, if so advised, the appellants may adopt appropriate proceedings in accordance with law and if they do so, then the matter will be decided uninfluenced by observations of TDSAT, if any, on the merits of the case.

No order as to costs"

28. We may, however, place on record that in PTC India Ltd. vs. Central Electricity Regulatory Commission, through Secretary, (2010) 4 SCC 603 itself it was observed as under :-

***"93.** For the aforesaid reasons, we answer the question raised in the reference as follows:*

The Appellate Tribunal for Electricity has no jurisdiction to decide the validity of the Regulations framed by the Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003. The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.

***94.** Our summary of findings and answer to the reference are with reference to the provisions of the Electricity Act, 2003. They shall not be construed as a general principle of law to be applied to Appellate Tribunals vis-à-vis Regulatory Commissions under other enactments. In particular, we make it clear that the decision may not be taken as expression of any view in regard to the powers of the Securities Appellate Tribunal vis-à-vis Securities and Exchange Board of India under the Securities and Exchange Board of India Act, 1992 or with reference to the Telecom Disputes Settlement and Appellate Tribunal vis-à-vis Telecom Regulatory*

Authority of India under the Telecom Regulatory Authority of India Act, 1997."

We, furthermore, are not aware of the facts involved in the said appeal.

Prima facie, it appears to us that different contentions are being raised by the respondent herein in different cases."

102. COAI (supra) was endorsed in UOI vs. Tata Teleservices, Maharashtra Ltd. (2007) 7 SCC 517. It even went to the extent of holding that for the purpose of ascertaining as to who would be a `licensee' within the meaning of Section 14 of the 1997 Act, even its definition in the notice inviting tender would be attracted, stating:

"21. According to the learned Additional Solicitor General appearing for the appellant, such a dispute would also come within the purview of Section 14 of the Act going by the definition of licensee and the meaning given to it in the notice inviting tenders. The argument of the learned Senior Counsel on behalf of the Respondent is that the expressions "licensor" and "licensee" are defined in the Act and the Respondent had not become a licensee and the appellant had not become a licensor since the agreement was never entered into between the parties for providing telecom services in the Karnataka Telecom Circle and the attempt to rope in an intending licensee to whom a letter of intent has been issued or the entering into a contract is proposed, cannot be countenanced since the Respondent has not become a licensee within the meaning of the Act and consequently this was not a dispute that came within the purview of Section 14(1) of the Act.

22. We have already indicated that a specialised tribunal has been constituted for the purpose of dealing with specialised matters and disputes arising out of licences granted under the Act. We therefore do not think that there is any reason to restrict the jurisdiction of the tribunal so constituted by

keeping out of its purview a person whose offer has been accepted and to whom a letter of intent is issued by the Government and who had even accepted that letter of intent. Any breach or alleged breach of obligation arising after acceptance of the offer made in response to a notice inviting tender, would also normally come within the purview of a dispute that is liable to be settled by the specialised tribunal.

23 We see no reason to restrict the expressions "licensor" or "licensee" occurring in Section 14(a)(i) of the Act and to exclude a person like the Respondent who had been given a letter of intent regarding the Karnataka Circle, who had accepted the letter of intent but was trying to negotiate some further terms of common interest before a formal contract was entered into and the work was to be started. To exclude disputes arising between the parties thereafter on the failure of the contract to go through, does not appear to be warranted or justified considering the purpose for which TDSAT has been established and the object sought to be achieved by the creation of a specialised tribunal."

103. The dispute between the parties was directed to be entertained although a concluded contract was yet to be arrived at and a UASL license was to be granted. A potential license, thus, has been held to be a licensee for the purpose of Section 14 of the 1997 Act.

104. We are not unmindful of the fact that recently the Supreme Court of India in UOI & Anr. vs. Association of Unified Telecom Service Providers of India reported in (2011) 10 SCC 543, invoking the principle of `Estoppel' held that :-

"47. *A dispute between a licensor and a licensee referred to in Section 14(a)(i) of the TRAI Act, therefore, is a dispute after a person has been granted a licence by the Central Government or the Telegraph Authority under sub-section (1)*

of Section 4 of the Telegraph Act and has become a licensee and not a dispute before a person becomes a licensee under the proviso to sub-section (1) of Section 4 of the Telegraph Act. In other words, the Tribunal can adjudicate the dispute between a licensor and a licensee only after a person had entered into a licence agreement and become a licensee and the word "any" in Section 14(a) of the TRAI Act cannot widen the jurisdiction of the Tribunal to decide a dispute between a licensor and a person who had not become a licensee. The result is that the Tribunal has no jurisdiction to decide upon the validity of the terms and conditions incorporated in the licence of a service provider, but it will have the jurisdiction to decide "any" dispute between the licensor and the licensee on the interpretation of the terms and conditions of the licence."

It sought to distinguish Tata Tele Services (supra), stating:-

"54. In Union of India v. Tata Teleservices (Mahrashtra) Ltd. (supra) cited by Mr. Srinivasan, a letter of intent was issued to Tata Teleservices and this was accepted by Tata Teleservices but ultimately the contract did not come into being and the license was not actually granted. The Union of India suffered a considerable loss because Tata Teleservices had walked out of the obligation undertaken by the acceptance of the letter of intent. The Additional Solicitor General appearing for the Union of India submitted that such a dispute would also come within the purview of Section 14 of the TRAI Act, going by the definition of licensee and the meaning given to it in the notice inviting tenders. The Tribunal held that expression "licensor" or "licensee" occurring in Section 14 (a) (i) of the TRAI Act would not exclude a person who had been given a letter of intent and who had accepted

the letter of intent but was trying to negotiate some further terms of common interest before a formal contract was entered into and the work was to be started. This was thus a case where this Court treated a person who had accepted the letter of intent of the licensor as a licensee, although a formal contract had not entered into. In this case this Court has not held that a licensee could dispute the validity of a term or condition which was incorporated in the license agreement."

105. In UOI vs. Millennium Mumbai Broadcast (P) Ltd. reported in (2006) 10 SCC 510, the Apex Court in a case where the broadcasting license was sought to be revoked opined that construction of the terms and conditions of license would be within the exclusive jurisdiction of this Tribunal.

It was held that this Tribunal has a wide power.

106. In the case of Hotel and Restaurant Association and Anr. vs. Star India Pvt. Ltd and Ors. reported in AIR 2007 SC 1168, the question which arose for consideration was as to whether providing TV sets in the rooms occupied by the guests of a hotel would attract the definition of `consumer' contained in the Consumer Protection Act, 1986 vis-à-vis Cable Television Networks (Regulation) Act (7 of 1995) and the 1997 Act. It was held :-

"38. The members of Appellants Associations stricto sensu do not retransmit the signals to any other person. It merely makes the services available to its own guests, which in other words, would mean to itself. If the amenities provided for by the management as a subscriber under TRAI Act is

inseparable from the other amenities provided to a boarder of a hotel, it remains a subscriber by reason of making the services available in each of the rooms of the hotel. It is not transmitting the signals of cable television network to any other persons. TRAI Act and various orders made thereunder are required to be read conjointly with a view to give harmonious and purposive construction thereto.

39. An attempt has been made by Mr. Desai to contend that the 1986 Act is a cognate legislation. Section 2(2) of TRAI Act provides that words and expression used and not defined in the said Act but defined in Indian Telegraph Act, 1885 or the Indian Wireless Telegraphy Act, 1933 shall have the meanings respectively assigned to them in those Acts. Thus, meaning of only such words which are not defined under TRAI Act but defined under those Acts could be taken into consideration. It is furthermore well known that the definition of a term in one statute cannot be used as a guide for construction of a same term in another statute particularly in a case where statutes have been enacted for different purposes."

A term defined in a statute should be interpreted keeping in view the provisions of a cognate legislation, The Consumer Protection Act was held to be not a cognate legislation, stating :-

107. In MSCO. Pvt. Ltd. v. Union of India and Ors. [(1985) 1 SCC 51] , this Court held:

"4. The expression 'industry' has many meanings. It means 'skill', 'ingenuity', 'dexterity', 'diligence', 'systematic work or labour', 'habitual employment in the productive arts', 'manufacturing establishment' ect. But while construing a word which occurs in a statute or a statutory instrument in the absence of any definition in that very document it must be given the same meaning which it receives in ordinary parlance or understood in the sense in which people conversant with the subject matter of the statute or statutory instrument understand it. It is hazardous to interpret a word in accordance with its definition in

another statute or statutory instrument and more so when such statute or statutory instrument is not dealing with any cognate subject....

46. TRAI Act and the 1986 Act are not in pari materia. They have been enacted for different purposes and in that view of the matter even Sirsilk Ltd. v. Textiles Committee and Ors : AIR 1989 SC 317 would have no application in the instant case."

108. We may also notice the following observations:-

"53. TRAI exercises a broad jurisdiction. Its jurisdiction is not only to fix tariff but also laying down terms and conditions for providing services. Prima facie, it can fix norms and the mode and manner in which a consumer would get the services.

54. The role of a regulator may be varied. A regulation may provide for cost, supply of service on non-discriminatory basis, the mode and manner of supply making provisions for fair competition providing for lavel playing field, protection of consumers interest, prevention of monopoly. The services to be provided for through the cable operators are also recognized. While making the regulations, several factors are, thus required to be taken into account. The interest of one of the players in the field would not be of taken into consideration throwing the interest of others to the wind."

We have referred to the aforementioned decisions of the Apex Court only to demonstrate that broad parameters as regards the jurisdiction of this Tribunal have been laid down therein.

109. Significantly, the 1997 Act refers to the Telegraph Act, 1885. The words which are not defined in the 1997 Act will have the same meaning as

defined therein, Section 38 moreover provides that the jurisdiction of the authority under the 1885 Act and the 1933 Act shall not be affected in relation to any area falling within the jurisdiction of such authority.

The jurisdictional aspect must be considered having regard to the aforementioned broad parameters.

The consideration in this behalf cannot be restricted.

Question of jurisdiction and the Precedents

110. The issue relating to Jurisdiction of this Tribunal came up for consideration before the Supreme Court of India in a large number of cases. We would, however, notice a few of them.

What is the nature and extent of jurisdiction of this Tribunal, albeit in the context of its appellate jurisdiction came up for consideration before the Supreme Court of India in COAI and Ors vs. UOI reported in (2003) 3 SCC 186.

In that case this Tribunal proceeded on the basis that its appellate jurisdiction is akin to the power of judicial review.

111. In COAI (supra) two different opinions were rendered. One of the opinion contained more detailed reasons. It was opined that the rule of

limited jurisdiction as regards different expert bodies like the TRAI applies only in respect of reviewing court and not an expert Tribunal. Whereas an appellate court would be entitled to enter into the merit of the matter, broadly speaking the review court would keep its jurisdiction confined to the decision making process.

It was held:-

> *"31 The rule as regard deference to expert bodies applies only in respect of a reviewing court and not to an expert tribunal. It may not be the function of a court exercising power of judicial review to act as a supermodel as has been stated in Administrative Law by Bernard Schwartz, 3rd Edn., in para 10.1, at p. 625; but the same would not be a case where an expert tribunal has been constituted only with a view to determine the correctness of an order passed by another expert body. The remedy under Section 14 of the Act is not a supervisory one. TDSAT's jurisdiction is not akin to a court issuing a writ of certiorari. The Tribunal although is not a court, it has all the trappings of a court. Its functions are judicial."*
>
> *32 In Jurisdiction and Illegality by Amnon Rubinstein, a judicial power in contrast to the reviewing power is stated thus:*
>
> > *"A judicial power, on the other hand, denotes a process in which ascertainable legal rules are applied and which, therefore, is subject to an objectively correct solution. But that, as will be seen, does not mean that the repository of such a power is under an enforceable duty to arrive at that solution. The legal rules applied are capable of various interpretations and the repository of power, using his own reasoning faculties, may deviate from that solution which the law regards as the objectively correct one."*
>
> ***33.*** *The regulatory bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsically, they act like an internal audit. They may fix the*

price, they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees.

34. *Statutory recommendations made by it are normally accepted by the Central Government, as a result of which the rights and obligations of the parties may seriously be affected. It was in the aforementioned premise Parliament thought of creating an independent expert tribunal which, if an occasion arises therefor, may interfere with the finding of fact, finding of law or a mixed question of law and fact of the authority. Succinctly stated, the jurisdiction of the Tribunal is not circumscribed in any manner whatsoever."*

112. It was furthermore observed :-

"37. *There cannot be any doubt whatsoever that when jurisdiction upon a court or a tribunal is conferred by a statute, the same has to be construed in terms thereof and not otherwise. The power of judicial review of this Court as also of the High Court, however, stand on a different footing. The power of this Court as also the High Court although is of wide amplitude, certain restrictions by way of self-discipline are imposed. Ordinarily, the power of judicial review can be exercised only when illegality, irrationality or impropriety is found in the decision-making process of the authority."*

113. It was furthermore noticed that the scope of judicial review would also vary from case to case.

In a given case, an entirely independent head of judicial review as for example the doctrine of `proportionality' may be applied in stead and in place of only `Illegality, Irrationality and Procedural Impropriety' tests.

Both the appellate as also the reviewing court may interfere when there is a misdirection in law.

The ratio laid down in COAI (supra) was considered by this Tribunal in Aircel Digilink vs. Union of India & Anr. 2005 (3) CLJ page 461 .

The question which arose for consideration therein was as to whether the arbitration clause contained in an agreement between the parties can be invoked only by the parties to an agreement in the event a dispute between them arises, and it was decided that this Tribunal will have jurisdiction in relation thereto.

114. D.P. Wadhwa, J. Chairperson, inter alia, opined that the jurisdiction of an Arbitrator could be barred by a statute either expressly or by necessary implication.

115. Noticing that the TRAI Act is a later Act vis a vis the Arbitration and Conciliation Act, 1996, it was held:

> *"17.1 The Act is not only a later legislation but is also a special legislation aiming to protect the interests of the service providers and the consumers of the telecom sector and to promote and ensure the orderly growth of telecom sector. Speedier adjudication of disputes by a specialised Tribunal having requisite knowledge and expertise of the sector is necessary for the growth of the sector in the long run. Therefore, to uphold the fabric of the Act, the jurisdiction vested in the TDSAT is and ought to be exclusive, which will also be in consonance with public policy.*

18. It is a matter of public policy laid in the public interest that telecom, broadcasting and cable services dispute which affect a large body of consumers all over the country should be amenable to one expert body. What will happen if in a dispute between two service providers in telecom sector arising out of an interconnection agreement, a service provider revokes the interconnection agreement. For these two, it may be dispute of recovery of money or damages or of technical nature but disconnection deprives consumers of access of one network to the other network. Consequences are not limited to the two service providers only but are of far reaching nature not difficult to imagine. Similarly, if in cable industry, a broadcaster and a multi-service operator sever their relations under alloyed breach of agreement, it affects again a large body of consumers who would not be able to avail the signals for various channels and yet having made payment. An arbitrator will find himself lacking jurisdiction to give relief to hapless consumers."

116. It was furthermore stated that the Act is a complete Code in itself and it has exclusive jurisdiction to adjudicate any dispute between the parties and also exercises exclusive appellate jurisdiction against any direction, decision or any order of the TRAI.

117. The Tribunal also noticed the decision of the Supreme Court of India in Clariant International vs. Securities and Exchange Board of India (2004) 8 SCC 524 paras 64 to 82.

It was concluded :

"21. The principles laid in various decisions of the Supreme Court cited above are quite explicit. TRAI Act is a special law, which will govern, and it overtakes general law, i.e., Arbitration Act, 1996. Also, TRAI Act, being the later Act (TDSAT was constituted by the Amending Act of 2000) has precedence over the earlier Act which is the Arbitration Act,

1996. The principle of generalia specialibus non derogant has been referred to in a judgment of Supreme Court in Talcher Municipality v. Talcher Regulated Market Committee and Anr. : (2004) 6 SCC 178. Consent cannot confer jurisdiction when there is none. Dominant public interest requires that all disputes in telecom sector which includes broadcasting and cable TV should be within the exclusive jurisdiction of TDSAT. In these circumstances, public policy demands that jurisdiction of Tribunal like TDSAT should be exclusive and arbitration agreement not to have any applicability.

22. If we refer to the provisions of the Act, particularly, Section 15, it is quite clear that the only exception is when there is arbitration under Section 7B of the Indian Telegraph Act, 1885, and in no other dispute within the jurisdiction of TDSAT the matter can go to the arbitration. Statute is clear. By judicial pronouncement no further proviso can be added taking away jurisdiction of TDSAT except MRTP, individual consumer disputes and dispute falling under Section 7B of the Indian Telegraph Act, 1885. Even otherwise jurisdiction of arbitration is barred by necessary implication. Provisions of Section 89 of the Code of Civil Procedure has no application inasmuch as jurisdiction of Civil Court to try any dispute under the Act is barred. A court, therefore, cannot, frame question arising out of the dispute in telecom sector and refer the same to arbitration. Only two other provisions which are to be read along with the Act are those under the Indian Telegraph Act, 1885, and the Indian Wireless Telegraphy Act, 1933. TDSAT will have jurisdiction in respect of any dispute as mentioned in Section 14 of the Act. It will also have the jurisdiction if dispute arises in respect of direct activities in telecom sector i.e. those relating to the telecom services. Dispute between two service providers as landlord and tenant would certainly be outside the ambit of the Act. Those disputes over which TDSAT has no exclusive jurisdiction and where the third party's interest like the consumers is not in issue or where there does not exist any public interest, the domestic forums chosen by the parties by way of an arbitration agreement may be held to be valid." (Emphasis Supplied)

We would deal with this matter further a little later.

118. Mr. Maninder Singh would contend that the TDSAT will have no jurisdiction where the third party interest like the consumer is not in issue.

According to learned counsel by reason of any service rendered by the Petitioner the consumers are not affected.

What had been emphasized was the exclusivity of jurisdiction of this Tribunal together with the consumers' interest.

In a case of this nature, ultimately consumer's interest would crop up in one form or the other.

In this case even the Respondents have contended that in case of stoppage of service , the consumers would suffer.

119. We may notice that while on the ground of non-payment of the arrears, the termination notice was issued, the Respondent by a letter dated 20.1.2012, stated :

> *"The willful/intentional breaches on your part is intentional and is calculated to cause irreparable damages and losses to Etisalat DB Telecom Pvt Ltd., knowing fully that it will cause `breach of the EDB's obligation to its Customers as well as its contractual and/ statutory obligations to DoT, Government of India as well as TRAI and has actually caused damages to EDB."*
>
> *(Underlining is ours)*

Similarly S. Tel. by its e-mail dated 28.11.2011, also stated:

> *"Already, great deal of damages has been caused to us by the disconnections effected by you since 25th November, 2011, impacting 191 sites so far. Our intention, in continuing to write to you, even at this point, is to focus on a resolution that does not further impact our connectivity and services."*

Any action taken in terms of the agreement, may therefore, affect the consumer's interest.

The quality of the cable, the standard of equipments may also have an impact on the ultimate services rendered to the consumers.

120. The Supreme Court of India, moreover, in Union of India vs. Tata Teleservices Maharashtra Ltd. (2007) 7 SCC 517 opined that the Union of India can invoke the jurisdiction of this Tribunal even in a case where the bid of the Respondent was mutually accepted and, thus, it was yet to become a licensee, stating :

> *"22. We have already indicated that a specialised tribunal has been constituted for the purpose of dealing with specialised matters and disputes arising out of licences granted under the Act. We therefore do not think that there is any reason to restrict the jurisdiction of the tribunal so constituted by keeping out of its purview a person whose offer has been accepted and to whom a letter of intent is issued by the Government and who had even accepted that letter of intent. Any breach or alleged breach of obligation arising after acceptance of the offer made in response to a notice inviting tender, would also normally come within the purview of a dispute that is liable to be settled by the specialised tribunal."*

A prospective licensee was thus construed to be a licensee.

An expansive meaning to the term 'licensee' had been assigned.

121. An important question with regard to the jurisdiction of this Tribunal came up for consideration in Total Telefilms Pvt. Ltd. vs. Prasar Bharti disposed of on 15.12.2008, wherein a Bench presided over by Arun Kumar, J. opined that although Prasar Bharti, having been constituted under a Parliamentary Act and thus, not required to obtain a license under Section 4 of the Act will be amenable to the jurisdiction of this Tribunal, as it was required to obtain a permission of the Union of India as a DTH operator, stating:

> *"21. Keeping in view the decisions of the Apex Court, as well as the observations given above, it does not appear to us that there is much ambiguity about the import of the use of terms 'means' and 'includes' in Section 2(j) of the TRAI Act. Evidently, these terms were used by the Parliament with deliberation. The very fact that the word 'government' existing in the TRAI Act 1997 was substituted by the words 'government as a service provider', clearly indicate that the term 'service provider' is defined to mean not only government as a service provider but also the licencee. This amendment was brought about in the year 2000 by which time the Prasar Bharati Act was already in force. If the intention of the Parliament was to exclude Prasar Bharati or any other such institution it would have been expressly stated. The fact that government itself was not excluded makes it difficult to believe that Parliament intended to exclude Prasar Bharati. A perusal of the preamble to the Prasar Bharati Act also does not reveal any intention of the parliament to exclude it from the operation of the provisions of any other statute, including those of the TRAI Act. Besides, like in several other Acts, the definition clause of the TRAI Act also starts with the expression 'unless the context otherwise requires'. After the amendment in the year 2000, the context has definitely changed in the sense that broadcasting service was notified as a telecommunications service, in keeping with the provisions of the TRAI Act. It is therefore necessary to read the*

definition of the term service provider in the context of the notification issued in January 2004."

122. It was opined that allocation of frequency is akin to a letter of intent and the word `license' having not been defined, must be understood in its ordinary grammatical sense, holding:

> *"This is the only authorisation for Prasar Bharati to conduct its DTH operations. As indicated, DTH is a Telegraph and every Telegraph activity requires licence under Section 4 of the Indian Telegraph Act. We have also concluded that there is nothing in the Prasar Bharati Act which automatically grants a licence to Prasar Bharati to undertake its DTH operations nor is there any provision to exempt it from the operation of the provisions of the Indian Telegraph Act. On the other hand, the explanation to Section 12(1) makes it explicit that Prasar Bharati is bound by the provisions of the Indian Telegraph Act. It can therefore be surmised that Prasar Bharati was acting under the authority granted to it by the letter dated 19.11.2003 from the Ministry of Information and Broadcasting."*

We wish, the Parliament would have risen to the occasion and brought about amendments to the Act to meet the ground realities.

123. Mr. Maninder Singh, however, would contend that the services rendered by the Petitioner do not come within the purview of the word `Telegraph'; whereas DTH service was held to be so keeping in view the fact that the meaning of the term `service provider' is exhaustive in nature.

124. The Department of Telecommunication (DoT) has a specific role to play in the matter of working out of the Telegraph. It can act only in terms

of the provisions of the Act as also the 1933 Act. It has the exclusive privilege having regard to the Section 4 of the Act as regards establishing, maintaining and working of telegraphs. Nobody else has that right. Apart from those statutes, DoT could not have exercised its power to distribute largesse.

It could not have parted with its exclusive privilege.

125. The Central Government in a case may grant a license for establishing and maintaining telegraphs but may keep unto itself the right of exclusive privilege so far as working of telegraphs is concerned, it does so by way of grant of a license, the same may also require grant of another license under the 1933 Act or may not.

The words `work or operate' found in the ISP Registration Certificate must be held to be different from the words `establish and maintained. All words have been used in the context of Section 4 of the Act.

When the Central Government parts with an exclusive privilege it may do so in its entirety or a part thereof.

Whereas the word `and' has been used in the main provision, the word `or' has been used in the proviso.

If, whether by way of grant of registration certificate or otherwise, any part of the exclusive privilege vested in the Central Government is to be parted with or outsourced in favour of any other entity, the same would mean a license.

The terms and conditions of the license have not been specified under the Act. No rule in this behalf has been framed.

126. Formulation of the `terms and conditions' for grant of license as well as fixation of consideration are within the exclusive domain of the Central Government. For the said purpose, it is not necessary for it to stick to one set of terms and conditions of the license. There can be different terms; depending upon the facts and circumstances of each case. It subject to the rule of `reasonable classification' as envisaged under Article 14 of the Constitution of India may lay down different terms and conditions and claim different amounts of consideration from different licensees.

If that be the legal position, it is difficult to comprehend as to why the power to lay down passive infrastructure would not come within the purview of Section 4 of the Act.

Interpretation of statute would depend on the text and context thereof. It must march with the passage of time.

127. This aspect of the matter has been considered in a case involving convergence of Telecommunication and Broadcasting Services, in respect whereof no Regulation has been framed, being in Star India Pvt. Ltd. vs. Bharat Sanchar Nigam Ltd. Petition No.72 of 2009 decided on 22.1.2010.

Therein the question which arose for consideration was as to whether an agreement between a broadcaster and a telecom operator can be a subject matter of dispute before this Tribunal.

128. Applying the principles of `purposive interpretation' it was held:

> *"The jurisdiction of this Tribunal as stated by the Apex Court is wide in nature.*
>
> *It having regard to its decision in Tata Teleservices (supra) is entitled to adjudicate any dispute arising between two service providers. The word 'any' in this context would mean all. It has to protect the interest of Service Providers.*
>
> *This aspect of the matter has been considered by the Supreme Court of India in Lucknow Development Authority Vs. M.K. Gupta - AIR1994SC 787 wherein it was held:-*
> *"4. .....*
>
> *.....*
>
> *.....The words 'any' and 'potential' are significant. Both are of wide amplitude. The word 'any' dictionary means 'one or same or all'. In Black's Law Dictionary it is explained thus, word "any" has a diversity of meaning and may be employed to indicate "all" or "every" as well as "same" or "one" and its meaning in a given statute depends upon the context and subject matter of the statute'.*

The use of the word 'any' in the context it has been used in Clause (o) indicates that it has been used in wider sense extending from one to all. ……"

35. The fact that the petitioner, as a provider of 'Broadcasting Service', is a service provider is beyond any dispute. Admittedly the respondent is also a service provider within the meaning of the provisions of the Act. The dispute herein is, thus, between two service providers.

Although ordinarily the nature of services provided by the parties hereto to the customers are absolutely different; by reason of the agreement in question, both have agreed to provide each other services for their own benefits.

See 14 of the Act does not mandate that the agreement between two service providers must be in accordance with an interconnect agreement within the purview of 2003 Regulation and 2004 Regulations. They operate in different fields and do not envisage a situation of this nature.

In fact a dispute between these service providers need not arise in relation to an interconnect agreement. What is necessary for the purpose of Section 14 of the Act is a dispute simplicitor. Of course, the dispute must arise in connection with telecommunication services. The Act does not mandate that the jurisdiction of this Tribunal will depend upon framing of a subordinate legislation.

Even otherwise, two service providers are at liberty to enter into a commercial agreement which need not be governed by a subordinate legislation. The respondent neither says nor can say that such agreement is statutorily prohibited.

Scientific and technological advances have made it possible that there be some convergence of different types of services.

36. It is not in controversy that even the respondent could provide the services, the petitioner has been asked to provide.

Respondent has, thus, outsourced its activities to the petitioner."
(Emphasis supplied)

129. So far as the interpretation clause is concerned relying on various decisions of Supreme Court of India it was noticed that the scheme as well as the object and purpose of a statute must be taken into consideration apart from the fact that the interpretation clause begins with the words "unless the context otherwise requires".

130. It was furthermore held that entering into interconnection agreement is not a sine qua non for invoking the jurisdiction of this Tribunal.

131. Mr. Maninder Singh, however, would contend that in this case apart from the fact that there does not exist any interconnection agreement, neither any `value added service' nor any `telecommunication service' is being rendered.

132. Our attention in this behalf has been drawn to an order passed by this Tribunal in CH Entertainment Pvt. Ltd. vs. Connect Broadband Services Ltd. Petition No. 98(C) of 2007 wherein the dispute arose out of alleged breach of contract of the Clause 2.3.2 of the distributorship agreement entered into by the parties thereto, whereby the Petitioner was to provide all possible support to the Respondent in getting the LCOs listed in Schedule I of the agreement.

133. This Tribunal held that it had no jurisdiction, stating:

> *"The dispute which now remains between the parties can at best be about the breach of the said two agreements. There is no dispute pertaining to telecom service. Therefore, in our view, this petition is not maintainable in this Tribunal and the same is accordingly dismissed. If the petitioner has any grievance it may approach the appropriate forum in accordance with law."*

In this case, however, we have held that the laying down of the dark fibre, construction of tower etc. would come within the purview of the definition of `telegraph'.

134. Reliance has also been placed by Mr.Maninder Singh on a decision of this Tribunal in M/s Tirupati Teleservices vs Zee Turner Ltd. wherein keeping in view the fact that the Petitioner therein was not in the business of transmission or retransmission of signals but merely a `dealer agreement' had been entered into, it was opined that:

> *" The petitioner on its showing is not under business of transmission or re-transmission of signals. It is only collecting money on account of subscription fee from the subscriber from the signals supplied by the respondent. A reference to the prayer contained in this petition also shows that the controversy raised in the present petition is in the nature of a civil dispute. Accordingly this petition is not maintainable and is disposed of."*

The aforementioned two decisions were distinguished by this Tribunal in several decision including Star India (supra) and, thus, need not considered once over again.

See also IndusInd Media Vs. Citi Cable .

135. Apart from the aforementioned decisions, we may furthermore notice that in IndusInd India Communication Ltd. vs. Citi Cable Petition No.67 (C) of 2008 disposed of on 27.7.2011, this Tribunal opined that CH Entertainment Pvt. Ltd. and Tirupati Teleservices have no application in the context of that case..

We may place on record that in the case of Star India (supra), the correctness of the judgment in Aircel Digi link was consciously not questioned as would appear from paragraph 54 thereof.

136. Our attention has also been drawn to a decision of Computer Sciences Pvt. Ltd. vs. Department of Telecommunication being Petition No.413 of 2010 wherein a dispute by and between an ISP category one certificate holder and the licensor relating to imposition of penalty was the subject matter of lis.

137. This Tribunal opined :

"38. Section 4 of the 1885 Act provides for a monopoly in

favour of the State. Only by reason of a National Telecom Policy, 1994, the Central Government thought of a duopoly, by reason whereof it had taken a policy decision to grant licence to various private players on the basis of the bids submitted by them in respect of each circle. However, by reason of National Telecom Policy, 1999, the Central Government thought to take recourse to Multipoly. The new policy frame work focuses on creating of environment, which enables continued attraction of investment in the telecom sector and allows creation of communication infrastructure by liberalizing on technological development and towards the said end, it was to look at the Telecom service sector in respect of Cellular Mobile Services, Radio Paging Services, Public Mobile Radio Trunking Services, National Long Distance Operations, International Long Distance Operations, Other Service Providers, Global Mobile Personal Communication by Satellite Service Providers and V-SAT based Service Providers.

From the stage of communication by voice only, the definition of 'telegraph service' has been expanded from time to time. The petitioner, we are informed, made investments in India.

The petitioner was granted a Registration Certificate in stead and in place of a licence. The term 'licence' as indicated heretobefore, is not defined in the 1885 Act.

The licence granted by way of auction to a highest bidder need not necessarily be statutory in nature. It is a trite law that the words 'licence' and 'permission' are interchangeable terms. It has been so held in the Modi Rubbers Ltd. Vs. Union of India reported in 2010 (150 ELT page 52) in the following terms :-

> *"16. The provisions of Sub-section(2) of Section 11, Rule 15, Form 'F' as also the dictionary meanings of the word 'license', as noticed hereinbefore, in no uncertain terms show that the words 'license' and 'permission' are inter-changeable.*
>
> *22. We have arrived at the aforementioned conclusion inasmuch as there does not exist any distinction between license and permission.""*

138. It was furthermore observed:

"47. If a licence can be granted in respect of the equipments, which are capable of being used, should we, by an interpretative process, give it a meaning so as to curtail the jurisdiction of this Tribunal? The answer to the said question should, in my opinion, be rendered in negative. (See G.P. Singh's principles of interpretation of statutes – page 708, 11th Edition). What is capable of being used, can also be misused. The same, therefore, would attract the provisions of the 1885 Act having regard to the provisions contained in Section 20 and 20-A thereof. We fail to see any reason as to why the word 'telegraph' shall be given a narrow meaning, particularly in view of the fact that the equipments and appliances installed by the petitioner would come within the purview of the definition of the said term.

In fact, the respondents themselves in no uncertain terms, invoke with the provisions of the UASL licence on the premise that the conditions of grant have been violated.

It is on the aforementioned backdrop, the terms 'licensee' and 'licensor', as contained in Section 2 (e) and 2 (aa) of the 1997 Act must be construed.

A licence may be granted for certain purpose, which need not be for providing specified public telecommunication service. But in terms of the provisions of the Indian Telegraph Act, the term 'licensee' can be given a broader meaning taking in view the purport and object of Section 14 of the Act.

48. I am of the opinion that the term 'licensee' must be considered keeping in view the words "unless the context otherwise requires".

It is not possible to read the word 'licensor' as the Central Government granting licence under Section 4 of the1885 Act and not to give a corresponding meaning to the term 'licensee' in Section 2(e) thereof, particularly in view of the fact that the term 'licensor' has been inserted subsequently."

139. It was noticed that if such a contention is raised that ISP-1 Category Registration Certificate would not come within the purview of the telecom

sector, the TRAI will have no jurisdiction to make any recommendations which on the face of the 1997 Act it has.

In that case the Petitioner was directed to pay a sum of Rs.14,21,415/- by way of damages. Appeals were preferred thereagainst.

140. The Supreme Court of India by an order dated 6.1.2012 passed the following order:

> *" Civil Appeal No.....Dy.34930/2011:*
>
> *Learned counsel for the appellant seeks permission to withdraw the appeal. Permission is granted. The civil appeal is, accordingly, dismissed as withdrawn.*
>
> *Civil Appeal No.10076 of 2011:*
>
> *To put an end to the controversy involved in this case, we direct the parties to move under Clause 5.0, which is quoted at Page 25 of the Appeal Paper Book. The said clause provides for arbitration. The Director General, Telecommunication, shall nominate an Arbitrator within a period of four weeks. Disputes, both with regard to liability and quantum of damages, will be decided by the Arbitrator within a period of four months from the date of nomination of the Arbitrator.*
>
> *The civil appeal is, accordingly, disposed of.*
>
> *The interim Order passed by this Court on 12th December, 2011, shall continue to operate till the Award is made by the Arbitrator."*

Submission of Mr. Maninder Singh is that having regard to the doctrine of `Judicial Discipline', it must be held by this Tribunal that when

there exists an arbitration clause, the same must be held to be prevailing over the provisions of Section 14 of the 1997 Act.

141. In our considered view reference to arbitration could have been resorted to by the Supreme Court of India in exercise of its jurisdiction under Article 142 of the Constitution with a view to do complete justice between the parties in the facts and circumstances of the case.

When a lis is decided inter parties, either in exercise of its appellate jurisdiction under a statute or in terms of Article 136 of the Constitution of India upon grant of leave, what is rendered by the Apex Court is a binding decision between the parties.

142. Article 141, however, mandates that the law laid down by the Supreme Court of India would be the law of the land.

It is, however, difficult to arrive at the conclusion that any law has been laid down in terms of Article 141 of the Constitution of India by the Supreme Court to the effect that Arbitration and Conciliation Act, 1996 shall prevail over the provisions of the 1997 Act.

If no ratio can be culled out from the said judgment, the jurisdictional issue raised by the Respondent, in the opinion of this Tribunal can be

determined independent of the said order passed under Article 142 of the Constitution of India.

143. Matter might have been different had a law been laid down in absence of a Parliamentary statute or where the area was grey in which event the same would prevail until the Parliament intervenes.

144. Mr.Maninder Singh would contend that the 1997 Act, does not provide for a non obsante clause and thus, the `telecommunication services' should not be read as a `telegraph service'.

145. Section 38 of the 1997 Act, however, provides that the provisions thereof shall be in addition to the provisions of the 1855 Act and the 1933 Act and nothing therein shall affect any jurisdiction, powers and functions required to be exercised or performed by the telegraph authority in relation to any or following within the jurisdiction of such authority.

The power to grant license is within the purview of said proviso appended to Section 4.

146. The power of the Central Government can be delegated to the Telegraph Authority. The Delegator, it is well-known, retains it's jurisdiction to discharge the delegated function and may itself exercise the same at any time unless the delegating order states otherwise.

Ouster of Jurisdiction

147. The question of ouster of jurisdiction as envisaged under Section 9 of the Code of Civil Procedure, 1908 depends upon several factors; one of them being as to whether a new right has been created. The right to grant license is created under the Indian Telegraph Act.

The dispute between a licensor and licensee by an Expert Tribunal as also dispute between a service provider and service provider apart from the general law have been specifically provided.

148. Section 15 of the Act specifically excludes the jurisdiction of the Civil Court.

If that be so the general remedy is barred. A body with a judicial functions has been created.

149. It is stated in Bennion on Statutory Interpretation 5th Edition at page 117, referring to a decision of Debt vs. General Medical Council, 2004 EW Acc 2977, "on appeal and review from an expert Tribunal, the Court lacking the expertise in question should intervene only when the decision is perverse." The Tribunal having expertise, therefore, as indicated heretobefore must be held to have jurisdiction over such matter.

150. In S.A. De' Smith's Judicial Review of Administrative Action 6th Edition at page 53, albeit, in the context of Tribunal, and Tribunals, Courts and Enforcement Act, it was stated :-

> *"The First-tier Tribunal and the Upper Tribunal are public authorities operating under the rule of law and it is important that parties aggrieved by their determinations are able to challenge them. In the new tribunal system, there are three main ways of challenging decisions. First, "reviews" may be carried out to identify and correct errors without the need for a full appeal."*

When an original jurisdiction is exercised by a Tribunal of this nature, only the Appellate Jurisdiction of the Supreme Court of India is in terms of Section 18 can be invoked.

151. In G.P. Singh's Principles of Statutory Interpretation at page 771, various instances have been cited to show that the legislature does not take away the Civil Court's jurisdiction only when a new right is created and a new Tribunal is set up for determination of that right. (See also Akbar Khan vs UOI AIR 1962 SC 70 at 72).

152. In Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement, (2010) 4 SCC 772 the Supreme Court of India opined:-

> *"31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this*

aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction."

BSNL and MTNL in their capacity as licensees provide space to the other licensees in their exchanges on a consideration as may be determined.

153. In Vodafone vs. MTNL Petition No.32 of 2010 disposed of on 4.2.2011 a question arose as to whether reasonableness of the rate fixed by the said public sector undertakings is amenable to the jurisdiction of this Tribunal on the premise that in relation thereto MTNL acted only as a landlord. The said contention was negatived.

Arbitration and Concilliation Act, 1996 – Applicability of

154. Mr.Maninder Singh would submit that having regard to Section 5 of the Arbitration and Conciliation Act, 1996 the jurisdiction of this Tribunal will be barred as there exists an arbitration clause.

155. We do not agree principally having regard to the decision in Aircel Digilink (supra). There is, moreover, nothing on record to show that the stage for involving the arbitration agreement has reached in view of its limited nature. There is also nothing to show that the stage therefor has come into being keeping in view to the dispute resolution clause contained in the agreement.

156. We may notice the order dated 22.11.2009 in Vertex Broadcasting Company vs. UOI, Petition No.252(C) of 2009 that a dispute arose before a learned Arbitrator as to whether this Tribunal has exclusive jurisdiction. The matter was referred by the learned Arbitrator to this Tribunal. Upon hearing the counsel for the parties it was held that the learned Arbitrator has no jurisdiction and this Tribunal alone has jurisdiction to determine a dispute between a licensee and the Union of India. Even otherwise the jurisdiction of an Arbitrator is barred by necessary implication as noticed in IndusInd Media (Supra).

157. Reliance has also been placed by Mr. Maninder Singh in Gujarat Urja Vikas Nigam vs. Essar Power Ltd. reported in 2008(4) SCC 755.

158. The Supreme Court of India in that case while considering the provisions of Sections 86, 158 and 174 and 175 of the Electricity Act, 2003 was of the opinion that the said Act having provided for a right in the State Commission to decide a dispute itself, or to refer the same to some Arbitrator, stated the law thus:

> *"**28.** Section 86(1)(f) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law. Hence, in our opinion, Section 11 of the Arbitration and Conciliation Act, 1996 has no application to the question who can adjudicate/arbitrate disputes between licensees and generating companies, and only Section 86(1)(f) shall apply in such a situation."*

159. It was furthermore observed:

> *"31. There are various reasons why the State Commission may not decide the dispute itself and may refer it for arbitration by an arbitrator appointed by it. For example, the State Commission may be overburdened and may not have the time to decide certain disputes itself, and hence such cases can be referred to an arbitrator. Alternatively, the dispute may involve some highly technical point which even the State Commission may not have the expertise to decide, and such dispute in such a situation can be referred to an expert arbitrator. There may be various other considerations for which the State Commission may refer the dispute to an arbitrator instead of deciding it itself. Hence there is no violation of Article 14 of the Constitution of India.*
>
> *34. Section 174 provides that the Electricity Act, 2003 will prevail over anything inconsistent in any other law. In our opinion the inconsistency may be express or implied. Since Section 86(1)(f) is a special provision for adjudicating disputes between licensees and generating companies, in our opinion by implication Section 11 of the Arbitration and Conciliation Act, 1996 will not apply to such disputes i.e. disputes between licensees and generating companies. This is because of the principle that the special law overrides the general law. For adjudication of disputes between the licensees and generating companies there is a special law namely 86(1)(f) of the Electricity Act, 2003. Hence the general law in Section 11 of the Arbitration and Conciliation Act, 1996 will not apply to such disputes."*

The said decision was rendered having regard to the provisions of the Electricity Act, 2003.

160. The Court did not have any occasion to decide a question as to whether the Arbitration and Conciliation Act, 1996 shall prevail over another Parliamentary Act like the 1997 Act.

161. Mr.Maninder Singh would urge that in Gujarat Urja (supra) it was found that Section 174 conferred on the Electricity Appellate Tribunal exclusive jurisdiction.

The fact that with regard to the matters covered by Section 14 and 14A of the Act only this Tribunal has jurisdiction which is beyond any doubt or dispute.

Non-Obstante Clause – Effect of its absence

162. It is urged that whereas the Electricity Act, 2003 contains a `Non Obstante' clause, `the Act' does not.

Even in absence of a Non Obstante clause, a Tribunal created for specific purposes can be conferred with exclusive jurisdiction.

A non obstante clause contained in a statute would certainly be relevant for the purpose of interpretation thereof but even in absence thereof the construction therein must be based on the text and context thereof.

163. In Geeta vs. State of U.P. (2010) 13 SCC 678, the Apex Court interpreted that the expression "shall continue to hold office as such", in the context of a non obstante clause in the following terms :-

"47. Unfortunately, the High Court in the impugned judgment held that the non obstante clause in Section 7(3) has to be read as totally obliterating other provisions of the Amendment Act and that the Up-Pramukhs who were elected prior to the Amendment Act would continue to hold office as if the Amendment Act in its entirety had not been enacted.

48. However, in view of several decisions of this Court discussed above, we hold that the non obstante cause in Section 7(3) will have a limited operation to the extent of allowing the Up-Pramukh to "continue to hold the office as such … as if the said Act were not enacted"

49. In our view, the term "continue to hold the office as such" would mean that despite the abolition of the post of Up-Pramukh in the amending Act, those who were elected as Up-Pramukh prior to such amendment will just continue as such i.e. as Up-Pramukh till his term expires. The expression "as such" has been added by way of caution and to emphasis that the continuance of Up-Pramukh is limited to just holding the office of Up-Pramukh."

In any event the jurisdiction of this Tribunal in such matters having been determined in Aircle Digi link, the correctness whereof was also not questioned by Mr.Maninder Singh in Star India (Supra), we are of the opinion that the said decisions have not been overruled by necessary implication in Gujarat Urja (supra) as contended by Mr.Singh.

Cessation of Operation Issue

164. Mr.Dayan Krishnan submitted that his client S Tel Ltd. having ceased to carry out any operation in terms of the decision of the Supreme

Court of India in Centre for Public Interest Litigation (supra), this Tribunal will have no jurisdiction.

The said submission cannot be accepted for more than one reason.

165. The Supreme Court itself in Centre for Public Interest Litigation (supra) granted time to the licensees whose licenses were directed to be cancelled till June 2012 to carry out their operations operation. (The Respondent even filed an application for review of the said judgment, which however, has been dismissed alongwith other Review Applications).

If despite the same the license had not been performing their functions, it cannot take advantage thereof [See paragraph (iii) and (vi) paragraph 102 of Centre for Public Interest Litigation (supra)].

166. Moreover in Bargachh Telelinks Pvt Ltd. & Anr. vs. M/s Noida Vision disposed of on 28.5.2010 it was opined by this Tribunal:-

> *"…Given the ordinary meaning assigned to the term `Dispute' between two service providers; the same would not mean that so long as they remain service providers and both of them must continue to have the relationship, although, when the dispute arose, both of them were service providers."*

167. In Eureka Cable TV Network vs. Valric Cable & Anr., Petition No.29(C) of 2008 disposed of on 28.05.2010, it was held:

> *"It is now a well settled principle of law that subject to consideration of subsequent events, the issues raised in a petition would have to be determined as on the date of filing thereof. The petitioner has filed this application on or about 21.2.08. It had, as noticed hereinbefore, has prayed for a decree for a sum of Rs.6,14,167/- up to the period January, 2008. A bare perusal of the provision of Section 14 of the Act would clearly go to show that the period for which the outstanding has been claimed is for the period during which the respondent no.1 admittedly was a MSO. If that be so, only because he has allegedly ceased to be so at a later date, the same would not mean that this petition would not be maintainable."*

Has a divergent view taken in Oil India Ltd.?

168. Mr. Maninder Singh has relied upon a decision of this Tribunal in Oil India Ltd. vs. UOI being Petition No.272 of 2011 wherein jurisdiction of this Tribunal was not in question.

The Petitioner therein was a public sector undertaking. It had two licenses, one a National Long Distance License and the other an ISP category one license.

169. The question which arose for consideration therein was as to whether license fee could have been demanded from the Petitioner therein in respect of its activities of ISP Category I registration holder while computing its AGR as a NLD license holder The answer thereto was rendered in the negative.

A judgment as is well known is not to be read as a statute.

170. It must be read having regard to the factual matrix involved therein.

It was held:

> *"64 The Court should not place reliance upon a judgment without discussing how the factual situation fits in with a fact-situation of the decision on which reliance is placed, as it has to be ascertained by analysing all the material facts and the issues involved in the case and argued on both sides. A judgment may not be followed in a given case if it has some distinguishing features. A little difference in facts or additional facts may make a lot of difference to the precedential value of a decision. A judgment of the Court is not to be read as a statute, as it is to be remembered that judicial utterances have been made in setting of the facts of a particular case. One additional or different fact may make a world of difference between the conclusions in two cases. Disposal of cases by blindly placing reliance upon a decision is not proper. (Vide: Municipal Corporation of Delhi v. Gurnam Kaur, AIR 1989 SC 38; Govt. of Karnataka v. Gowramma , AIR 2008 SC 863; and State of Haryana v. Dharam Singh; Ors. (2009) 4 SCC 340)."*

Those observations were made on a pre-supposition that NLD license was the only license granted under Section 4 of the Act in regard to its telecommunication activities for which AGR was payable and not the other one.

171. The said decision having been rendered in different fact situation, we are of the opinion the same cannot be said to have been application in the instant case.

No divergent view therein, therefore, has been rendered. It was decided in different context.

172. Oil India (supra) is moreover not an authority on the construction of Section 4 of the Act. No argument was advanced on the said question and, thus, no decision has been rendered. No question of jurisdiction was debated at the bar. Stray observations, it is well-settled torn out of context, cannot have a precedential value. Opinion having been rendered sub silentio and without any argument does not become a binding precedent. (See Divisional Controller, KSRTC vs. Mahadeva Shetty and Anr. (2003) 7 SCC 197) (For a detailed discussion on the subject see Deb Narayan Shyam and Ors. vs. State of W.B. and Ors. (2005) 2 SCC 286).

Applicability of Section 14 of the Act

173. The 1997 Act uses the word `licensee' only at three places, namely, its definition, in Section 2 (j) and Section 14 of the Act. At all other places the Act uses the words `Service Provider'.

It is a well-known principle of law that when two different words as used in the same statute ordinarily the same should be given different meanings. If that be so, the meaning of the word `Service Provider' and `licensee' must be construed differently.

174. On the face of the provisions of the Act, the scope and ambit of the word `service provider' must be held to be more expansive then the word `licensee'.

Only in that view of the matter, the text and context of the statute becomes relevant.

175. Mr.Maninder Singh, urged that in the `Preamble' of the 1997 Act, only the words `telecommunication services' have been used and the TRAI and this Tribunal have been constituted to regulate only `telecommunication services' and not the `telegraph services'.

The fact that the Parliament has referred to Section 4 of the Indian Telegraph Act, 1885 in the context of definition of the word `licensee' and `licensor' is indicative of the fact that what is sought to be emphasized is that the Regulatory regime in regard to the `Telecommunication Services' industry.

[See the discussions in Aircel Digilink (Supra)]

Indisputably, the functions performed by the DoT are confined to the 1885 Act and 1933 Act.

`Telegraph' is, therefore, an integral part of the `Telecommunication Services'. To hold otherwise would cause violation to the object and purpose of the Act.

176. We may also notice the Tribunal's opinion in the case of Reliance Infocomm Ltd vs. UOI (DoT) being Petition No.3/2005 decided on 04.03.05:-

> *"40. Telegraph Act, however, grants exclusive privilege in respect of working of telegraphs on the Central Government and by granting license Central Government has parted with that exclusive privilege in favour of licensee to an extent. Nature of duty in telecommunication is such that any licensee under Section 4 could be said to have undertaken to perform public duty. The cases cited by Mr.Salve are those which relate to trade of liquor. There is no law that right to trade in liquor or intoxicants exclusively belongs to the State and it is the State which is parting that right (or privilege) in favour of the traders. There is, therefore, marked difference as under Section 4 of Telegraph Act where exclusive privilege is conferred on the State i.e. the Central Government."*

It was observed :-

> "43.... It must also be noticed that licenses have been granted under Section 4 of the Telegraph Act before the TRAI Act came into force. We, therefore, do not find any merit in this contention of Mr.Salve and reject the same."

It is further observed:

> *"43. .....The Court referred to the definition of telegraph and noticed that there was no dispute that the expression 'telegraph' as defined in the Act shall include telephones and telecommunications services. The Court observed that Central Government is expected to put such conditions while granting licenses, which shall safeguard*

the public interest and the interest of the nation. Such conditions should be commensurate with the obligations that flow while parting with the privilege which has been exclusively vested in the Central Government by the Act. The Court also noticed promulgation of Telecom Regulatory Authority of India Ordinance, 1996 and the definition of the "telecommunication services' and other provisions in the ordinance. Referring to the tender conditions Supreme Court noticed that in Section III contained different conditions including in respect of security in Clause 16. The Court said that there was no dispute with the expression 'telegraph' as defined in the Telegraph Act shall include telephones and telecommunication services. The Court noticed:

"In view of the clear and unambiguous proviso to sub-section (1) of Section 4, enabling the Central Government to grant licences for establishment, maintenance or working of telegraphs including telecommunications, how can it be held that the privilege which has been vested by sub-section (1) of Section 4 of the Act in the Central Government cannot be granted to others on conditions and for considerations regarding payments? According to us the power and authority of the Central Government to grant licences to private bodies including companies subject to conditions and considerations for payments cannot be questioned. That right flows from the same sub-section (1) of Section 4 which vests that privilege and right in the Central Government".

It must also be noticed that licenses have been granted under Section 4 of the Telegraph Act before the TRAI Act came into force. We, therefore, do not find any merit in this contention of Mr.Salve and reject the same.

44. In the present case the nature of license is such that any breach of its obligations on the security aspect can be of serious consequence for the nation."

177. Mr.Maninder Singh submitted that having regard to the definition of the `Telecommunication Services', the same must be made available to users.

178. Would that mean that an important component of services, i.e. when a service is rendered by one service provider to another and not to the consumers directly, the same would be outside the preview of the jurisdiction of the Tribunal ?

This question has categorically been answered in Star (India) Ltd (Supra).

179. Mr.Singh submitted that, if apart from the `Telecommunication Services' other services were to be declared as carrying similar services; the Central Government could have issued a notification under the proviso appended to the Section 2 (k) of the Act.

180. We may notice that on or about 9.1.2004, the Central Government issued such a notification on 9.1.2004 whereby Broadcasting and Cable Services were declared to be `Telecommunication Services'.

Some of the decisions referred to heretobefore were rendered only in that context.

Moreover, it is not disputed that before the High court of Delhi, Etiselat itself stated that only this Tribunal has jurisdiction to determine such dispute.

181. We are not invoking the Doctrine of Estoppel, as otherwise it would not have been necessary for us to deal in great details the contentions of learned counsel.

It only goes to show that even the Respondent thought in the same way.

182. Moreover, in this case this Tribunal cannot be said to be wanting jurisdiction in the other cases, as licenses have admittedly been granted to the Petitioners therein under Section 4 of the 1885 Act, which covers the petitions filed by Reliance Communication ltd. and Reliance Telecom Ltd.

Conclusion

183. For the reasons aforementioned we are of the opinion that this Tribunal has jurisdiction to adjudicate the dispute on merit.

184. The prayer of the Respondent(s) in this behalf is rejected.

185. Submissions have been made by Mr.Srinivasan that an interim order of injunction restraining the Respondent from alienating its property may be passed.

186. Our attention has been drawn to an order passed by the Delhi High Court, where Sistani, J has passed a similar order.

187. However, as Etisalat has already been restrained by a competent court of law, no ad interim order need be passed at this stage.

188. However, so far as S Tel is concerned, it may subject to any other or further order that may be passed by this Tribunal is restrained from transferring its property to a third party without the leave of this Tribunal by way of an ad-interim measure.

189. For hearing on the interim prayer made by the Petitioner, list after one week

.....
(S.B. Sinha)
Chairperson

.....
(P.K. Rastogi)
Member

Anu/HKC/ 9.4.2012